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Former Advocate General

Jammu and Kashmir.

SHORT NOTES AND COMMENTS, ORIGINAL ARTICLES,
CRITICAL NOTES, REVIEWS OF BOOKS, ETC.



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GENERAL INDEX



NOTE — Reference to pages relates to Journal sections of the various journals and periodicals.

- Abadi — Boundary dispute between tenants — Jurisdiction of revenue Courts: 1941 R D 898 reviewed 1941 R D 8
- Admission — Inadvertent admission by defendant 1941 R D 6
- Agra Tenancy Act, (3 of 1926) S. 24 — Whether chela is heir to agricultural holding: 1941 R D 891 commented upon 1941 R D 8
- Aiyar, P. N. S. — Appointment as Accountant member of Income-tax Appellate Tribunal — Notification 9 I T R 32
- Ameer Ali, Justice—Knighted—Congratulations 45 C W N 117
- Lively judgment of, in *Forbes v. Robertson* (A I R 1941 Cal 117) 45 C W N 117
- merica—Chief Justice of Supreme Court 195 Ind Cas 28; 42 Cr L J 136
- Its debt to the constitution 1941 M W N 39
- President—Third term issue—Resolution passed by American Bar Association 1941 M W N 10
- Appeal—Argument of 195 Ind Cas 1; 42 Cr L J 97
- Arbitration—Its value in business disputes 43 Bom L R 5
- Arbitration Act (10 of 1940)—Its effect on practice for awards under Co-operative Societies Act A I R 1941 J 101; 1941 N L J 35
- Arrest — Killing while resisting 42 Cr L J 117
- Assault — Defence of an Irish prisoner 1941 O W N 8; 1941 R D 2
- Bacon, Sir Nicholas — Interesting story about (1941) 1 M L J 108
- Banerji, Upendra Nath — Death of 22 P L T 46; 1941 P W N 37
- Bar — Economic condition of Mlchigan lawyers 1941 M W N 14
- Publicity of—Unfavourable publicity harmful to the Bar 1941 M W N 40
- Social gathering of Akola Bar association 1941 N L J 5
- The new year to the members of the Bar 1941 A W R 5
- What makes for success at 1941 A W R 12
- Beckford, Lord Mayor — His spirited address to the King 1941 O W N 5; 1941 R D 3
- Bengal Agriculturists Debtors Act (7 of 1936) — Official Circular regarding meaning of word 'debt' withdrawn: 45 C W N 31
- S. 2 (8)—'Debt'—Meaning of 45 C W N 101, 102
- S. 13 (2)—Scope of : 45 C W N 817= (29) AIR 1942 Cal 227 Commented upon 45 C W N 127
- S. 34 — Claim for rent fallen due before and after 1-1-1940—Effect, if the tenant resorts to Debt Settlement Board 45 C W N 89, 91, 110, 111
- S. 84 — Small Cause Court decrees—Execution of—Whether liable to be stayed 45 C W N 94, 95
- S. 40 (1) — Appeals under the Act—Limitation 45 C W N 6, 7
- Bengal Money-lenders Act (10 of 1940), S. 2 (2) — "Borrower" — Meaning—Purchaser of equity of redemption : 45 C W N 850 and 45 C W N 530=(28) AIR 1941 Cal 484 Commented upon 45 C W N 130
- S. 2 (12) — Unpaid purchase money, if loan 45 C W N 115
- S. 2 (13)—Does Act affect stray cases of money lending 45 C W N 167
- Ss. 30, 31 and 34 — Unpaid part of consideration, if loan 45 C W N 46, 47
- Ss. 30, 36 (6) (a) — Application for review 45 C W N 156
- S. 30 (1) (a)—Construction of: 45 C W N 154 & 158
- S. 30 (1) (a) — Construction of : 45 C W N 1091 Commented upon: 45 C W N 165
- S. 31—Re-opening a decree—Installments and post-decree interest: 45 C W N 26
- S. 36 — Decree, if may be re-opened for the purpose of granting instalments 45 C W N 18, 19
- S. 36 — Instalments after mortgage decree 45 C W N 27
- S. 36—Decree partly satisfied and as to rest barred — If may be re-opened 45 C W N 38, 39
- S. 36 — Costs in respect of re-opened decree 45 C W N 50
- S. 36—Order under—Appeal 45 C W N 122, 126
- S. 36 — "Suit to which the Act applies"—Meaning of 45 C W N 133, 139
- S. 36 (2) — Calculation of interest under, in re-opening decree 45 C W N 170
- S. 36 (2) (a) — The new decree under the Act 45 C W N 118
- S. 38 — Power to grant instalments 45 C W N 51
- S. 44—Rules under—Rule 25—Validity of 45 C W N 54, 55
- Bengal Municipal Act (3 of 1884), S. 23—Occupier and right to vote 45 C W N 138, 140
- Bengal Non-agricultural Tenancy (Temporary Provisions) Act (9 of 1940)—Validity of 45 C W N 133
- S. 8—Ignorance of Legislature about law 45 C W N 2
- Bengal Shops and Establishments Act—Defects in 45 C W N 37, 42
- Bengal Tenancy Act (8 of 1885) S. 22 (before amendment in 1907)—One cosharer proprietor purchasing occupancy holding — Subsequent partition and such holding allotted to takhta of another cosharer — Whether former is entitled to keep possession over it: 1940 P W N 596=(27) AIR 1940 Pat 467 (FB) commented upon 1941 P W N 21
- S. 26F—'Tenants'—Meaning of: 45 C W N 43
- S. 26G—Validity 45 C W N 129
- S. 85A — Applicability to putni tenures 45 C W N 83

Bengal Tenancy Act

- S. 103B—Finding as to character of tenancy without considering presumption from Record of Rights — Whether revisable in second appeal: 45 C W N 57 = (27) A I R 1940 P C 192 commented upon 45 C W N 9
- (As amended in 1940), S. 168A — Injustice caused to landlords by introduction of this section 45 C W N 69, 71
- S. 168A—Anomalies under 45 C W N 74
- S. 168A — Whether applies to putni tenures 45 C W N 77
- S. 168A — A fundamental question under 45 C W N 98, 99, 103, 109, 111
- S. 168A—Scope 45 C W N 123
- S. 168A—If ultra vires 45 C W N 161, 163
- S. 168A—Effect of sale under cl. (b) of sub-sec. (1) 45 C W N 170, 171
- Ss. 195 (e), 168A—Scope of S. 195 (e) — Whether it prevails over S. 168A 45 C W N 85, 87

Benjamin, J. P.—As a lawyer: (1941) 2 M L J 68

—At the bar 53 M L W 28

Bombay Agricultural Debtors Relief Act (28 of 1939) — A review of some of the provisions of 43 Bom L R 1

—A revolting aspect of the Act 43 Bom L R 20

Books—Of legal reminiscence: (1941) 2 M L J 88

Braxfield, Lord—His phrase for all kinds of punishment (1941) 1 M L J 28

Bristol—Fire in, by air-raid (1941) 1 M L J 109

Browne, John Hutton Balfour—His interest in literature 1941 M W N 44

Brown, Sir Anthony—Reduced from post of Chief Justice to that of puisne Judge by Queen Elizabeth: 1941 O W N 6; 1941 R D 4

Bull—Note on slaughter of bulls: AIR 1941 J 107

Burn, Sir Sydney—Appointed as Officiating Chief Justice 1941 M W N 1

Byles, Serjeant—Appointed as a Judge in Court of Common Pleas — Witty toast proposed at dinner 1941 M W N 6

Calcutta High Court—Bar—The new rule regarding non-barrister advocates, robes and other rules 45 C W N 13

—Bar — New rule, robes and articulated clerks 45 C W N 17

—Non-barrister advocates enabled to get themselves enrolled on the Original Side 45 C W N 29

—New rule for civil revision cases 45 C W N 9

—Practice—Service of paper book estimates—A practical inconvenience: 45 C W N 17

—Rules relating to robes—Banning the blue gown 45 C W N 65

—The new Court-rooms 45 C W N 81

Calcutta High Court Appellate Side Rules, Chap. 2 Rule 1 — Amendment of — Effect 45 C W N 5

Calcutta High Court Civil Rules and Orders, R. 636—Effect of amendment: 45 C W N 86

Calcutta High Court Rules—Jurisdiction of Single Judges—Amendment of rule regarding 45 C W N 89

Calcutta Municipal Act (3 of 1923) — Right of Corporation to sanction plans which offend against Act — Remedy of adjacent owners 45 C W N 3

—S. 492—Howrah Pleaders and Municipal license fees 45 C W N 60, 67

Caldecote, Lord — Appointed as Chief Justice of King's Bench Division (1941) 1 M L J 52; 1941 P W N 12

Campbell, John — His election address

1941 O W N 10

Caroline, Queen—How she did not press her desire to enlarge her gardens

1941 O W N 5; 1941 R D 3

Census Act—Necessity for amending the Act 45 C W N 21, 22

C. P. Debt Conciliation Act (2 of 1939), S. 8 (2)—Discharge under—Effect outside the province: I L R (1940) Bom 799 = (27) A I R 1940 Bom 362 commented upon (1941) 1 M L J 27 (NIC)

C. P. Land Revenue Act (2 of 1917), S. 188 and O. P. Tenancy Act (1920), S. 49 — Sir land held in exclusive ownership by cosharer who transfers his proprietary share and becomes an occupancy tenant of Sir land — Right of transferee to collect rent from transferor : 1941 N L J 56 = (28) A I R 1941 Nag 21 reviewed 1941 N L J 2

Chandrasekhar Iyer, N.—Appointment as Judge 54 M L W 5; 1941 M W N 61

Chatterjee, Digambar—Death of 45 C W N 151

Child Marriage Restraint Act (19 of 1929), Ss. 5, 6—Scope of A I R 1941 J 34

—Ss. 5, 6—Bride not being child contracting child marriage — Liability of parents for mere participation in kanyadan : I L R (1940) Bom 709 = (27) A I R 1940 Bom 363 commented upon: (1941) 1 M L J 10 (NIC); 1941 A W R 11

Children—Some interesting things relating to children 43 Bom L R 63

Christian Marriage Act (15 of 1872)—Some anomalies in 43 Bom L R 56

Civil P. O. (5 of 1908), S. 2 (5) — Berar Courts are not foreign Courts : 1941 N L J 1 = (28) A I R 1941 Nag 86 reviewed 1941 N L J 2

—S. 47 and O. 22 R. 4 (2) — Legal representative brought on record in execution proceedings — Whether can have his own claims in suit decided in execution proceedings: (1941) 2 M L J 622 = (28) A I R 1941 Mad 898 (FB) commented upon (1941) 2 M L J 29 (NIC)

—S. 60 (1) (b) — Sewing machine — Whether tool of artisan : I L R (1941) All 278 = (28) A I R 1941 All 157 commented on (1941) 2 M L J 34 (NIC)

—S. 100—Bill to amend 1941 A L J 58, 60; 54 M L W 5; 1941 M O C 1

—S. 100 — Need for amendment of 194 Ind Cas 17; 42 Cr L J 86

—S. 151 — Scope — Decree involving fraud—Whether can be set aside under S. 151 : I L R (1941) 1 Cal 405 : (28) A I R 1941 Cal 386, commented on (1941) 2 M L J 46 (NIC)

—S. 152 — Scope — Whether restricted to correction of errors or mistakes occurring for first time in plaint : (1941) 2 M L J 452: (28) A I R 1941 Mad 940, commented upon (1941) 2 M L J 18 (NIC)

—O. 2, R. 3 — Alienations by manager in favour of different individuals at different times — Suit to avoid such alienations—Relief against various alienations not sought in same suit—Whether misjoinder: I L R 1941 All 370 : (28) A I R 1941 All 209, commented on (1941) 2 M L J 87 (NIC)

GENERAL INDEX

Civil P. C.

- O. 21, Rr. 18 to 20 — Applicability to mortgage decrees where personal remedy is barred (1941) 2 M L J 64
- O. 22, R. 9—Scope of—I L R (1941) 1 Cal 187²: (28) A I R 1941 Cal 347, commented upon (1941) 2 M L J 41 (NIC)
- O. 23, R. 1 & S. 12—A assigning his interest in suit to B and B's name substituted—Assignment found to be void — Whether A can proceed with the suit A I R 1941 J 45
- O. 33, R. 15—'Refuse' and 'reject' — Difference: I L R (1941) All 313: (28) A I R 1941 All 166, commented on (1941) 2 M L J 35 (NIC)
- O. 34, R. 1—Parties to suit—Mahomedan co-heirs 1941 A L J 78
- O. 38, R. 5 — Attachment before judgment of property in an Indian State 43 Bom L R 17
- O. 38, R. 7—Transfer by debtor after affixation of copy of attachment order on property affected — No order served on debtor — Whether attachment is effective: I L R 1941 All 99: (28) A I R 1941 All 41, commented on (1941) 2 M L J 33 (NIC)
- O. 38, Rr. 9, 11—Effect of dismissal of suit on attachment before judgment in suit A I R 1941 J 113
- O. 41, R. 20 — Addition of parties in second appeal — Power of Court 1941 A L J 43
- O. 41, R. 33 — Suit partially decreed — Appeal by plaintiff — Whether appellate Court can dismiss entire suit on ground that it is barred by time: 17 Ind Cas 638, commented upon 1941 A L J 95
- O. 44, R. 1—Equity of redemption—Whether should be taken into consideration in appeal by mortgagor from decree in mortgage suit: I L R (1941) 1 Cal 428: (28) A I R 1941 Cal 659, commented on (1941) 2 M L J 47 (NIO)
- Clerk, John — His pronouncement (1941) 2 M L J 89; 53 M L W 11; 1941 P W N 15; 192 Ind Cas 8; 42 Cr L J 81
- Cookburn, Lord — His interesting story about a medical witness (1941) 1 M L J 29
- Collet, A. L. — Conferment of O. B. E. on 45 C W N 117
- Companies Act (7 of 1913) S. 73 — "Outside the office"—Meaning: I L R 1941 Bom 186: (28) A I R 1941 Bom 97 reviewed (1941) 2 M L J 21 (NIC)
- Company—Criminal liability as occupier for not making adequate arrangement for combating fire under certain statute 196 Ind Cas 26
- Transfer of one company's property to another—Property whether includes contract of service 43 Bom L R 61; 22 P L T 17; 191 I O 4
- Confession — Admissibility of confessions by disclosure of documents 196 Ind Cas 85
- Contempt—Contempt and criticism: 42 Cr L J 69
- Contract — Breach of—War restrictions and excuse for non-performance of contracts 58 M L W 82
- Conclusion of—Contract by letters or interviews 196 Ind Cas 9
- Construction—Implied term—When can be said to exist 191 Ind Cas 5

Contract

- Contractors' liability to third parties 195 Ind Cas 25
- Essentials of 196 Ind Cas 29
- Hire-purchase—Hire-purchase agreements with unsettled terms 53 M L W 26
- Marriage contract—Breach of—Whether suit for damages lies at instance of minor girl: I L R 1941 Bom 211 = (28) A I R 1941 Bom 129 commented upon (1941) 2 M L J 10
- Mercantile contract — Avoidance of 194 Ind Cas 33
- Performance of—Effect of war 191 Ind Cas 30
- Third party to — When can sue to enforce contract 191 Ind Cas 1
- Copyright—Infringement of — Journalistic plagiarism—Instance of 45 C W N 46
- Corruption—Corrupt billeting officer: 42 Cr L J 95
- Cosharer — Ejectment of trespasser in joint mahals — Whether all cosharers should join: 1941 R D 942 reviewed 1941 O W N 11
- Cosharer in joint mahal taking possession of holding on extinction of tenancy without consent of other cosharers—Whether trespasser: 1941 R D 942 commented upon 1941 R D 7
- Lease by one of cosharers — Validity — Suit by another cosharer for ejectment: 1941 R D 921 reviewed: 1941 R D 8
- Mesne profits — Whether one cosharer can claim against another: 1941 A L J 3
- Costs — 'Suit dismissed with costs' — Several defendants—Whether should get separate sets of costs or should share one set of costs: ILR 1940 Bom 837 = (28) A I R 1941 Bom 16 reviewed (1941) 1 M L J 21 (NIC)
- Court—Death of Magistrate—Effect of 42 Cr L J 47
- Law Courts in ancient India 1941 A L J 27
- Lights going off — Funny incidents recalled (1941) 2 M L J 91
- Talking in—An interesting incident 1941 A W R 7; 58 M L W 12; 1941 M W N 7; 22 P L T 13; 191 I O 40
- Ventilating the Court—Hot and cold — Instances of (1941) 1 M L J 108
- Court of Wards Act (9 of 1879), S. 100—The Court of Wards Ordinance—Necessity of 45 C W N 97
- Crime—Detection of—Lie detector 42 Cr L J 135
- Detection of — Science as an aid in 42 Cr L J 133
- Juvenile crime (1941) 2 M L J 89
- Nature of — Offence against society 196 Ind Cas 28
- The social treatment of the adult offender 192 Ind Cas 1; 42 Cr L J 17
- Criminal investigation — Lie detector 1941 O W N 14; 195 I O 36
- Police should not offer exceptional temptation to commit offence 194 Ind Cas 24
- Criminality—Roots of 42 Cr L J 8
- Criminal law — Of India — A critical survey 42 Cr L J 3
- Prison reform (1941) 2 M L J 69
- Prison — The public and the prison 196 Ind Cas 9; 42 Cr L J 129
- Punishment — Object and forms of (1941) 2 M L J 45

Criminal law

- Sociological aspect of criminology 196 Ind Cas 5; 42 Cr L J 121
- Criminology—What is a criminal 42 Cr L J 113
- Criminal Procedure Code (5 of 1898), S. 144—Civil liberties and this section A I R 1941 J 41; (1941) 1 M L J 56
- S. 162—A note on scope and applicability of A I R 1941 J 52
- S. 162—Effect of U. P. Amendment Act, 9 of 1940 A I R 1941 J 52
- S. 162—A note on A I R 1941 J 65
- S. 162—A critical and historical examination of 45 C W N 61
- S. 164—Scope and object of 42 Cr L J 74
- S. 388—Bill to amend 1941 A L J 58, 67; 54 M L W 5; 1941 M Cr C 1
- S. 388—Need for amendment of 194 Ind Cas 17; 42 Cr L J 86
- S. 439 (2)—Notice to enhance sentence in trial with jury—Whether accused can challenge verdict of jury on facts: ILR (1940) Bom 500; (27) AIR 1940 Bom 279, commented upon (1941) 1 M L J 5 (NIC)
- S. 476—Order under—Revision of—Revisional powers to be exercised, whether under C. P. O. or Cr. P. C.: 191 Ind Cas 30
- S. 476—Order under passed by Civil Court—Revision—Revisional powers, whether to be exercised under Cr. P. C., S. 439 or Civil P. C., S. 115: 41 Cr L J 769; (27) A I R 1940 Mad 465 (FB) reviewed 42 Cr L J 1
- S. 497 (5)—Court's inherent power to direct arrest of accused even though he has been released on bail by another Court: ILR 1940 Bom 38; (27) A I R 1940 Bom 40 commented upon (1941) 1 M L J 3 (NIC)
- Criminal trial—Accused—Plea of guilty
 - Withdrawal of 196 Ind Cas 21
- Accused—Deaf and dumb 196 Ind Cas 32; 42 Cr L J 152
- Accused's unconscious admission: 1941 R D 6
- Admission—Use of word 'anti-social' by accused for crime 195 Ind Cas 12
- Appeal against acquittal—Limitations in exercise of jurisdiction: 1941 M W N 2
- Bench of Magistrates—No necessity for 7 members 194 Ind Cas 32
- Blood test—Magic colours of blood 42 Cr L J 139
- Circumstantial evidence—Conviction based on 1941 O W N 10
- Commitments—Faulty commitments 42 Cr L J 38
- Conviction—Absence of motive—Sufficiency of evidence 192 Ind Cas 7; 42 Cr L J 32
- Conviction—No conviction without facts (1941) 1 M L J 27
- Conviction—Facts wanted 1941 P W N 27
- Death of Magistrate—Effect on process he may have issued 192 Ind Cas 31
- Death of Magistrate—Effect on previous proceedings 194 I C 18; 42 Cr L J 90
- Defence—Plea of obedience to orders of superior by soldier 194 Ind Cas 13
- Defence of drunkenness—Kind of direction to be given to jury 196 Ind Cas 25; 42 Cr L J 140
- Evidence—Admissibility and weight of 1941 P W N 24

Criminal trial

- Evidence—Removal of, by cremation 195 Ind Cas 20
- Evidence in rebuttal of defence case 42 Cr L J 49
- Escape and prison-breaking—Assisting of 194 Ind Cas 20
- Executive interference with 45 C W N 125
- General exceptions—Ignorance of law is no excuse 191 Ind Cas 32
- Murder by poison—Instances of 42 Cr L J 116; 195 Ind Cas 21
- Murder—Killing while resisting arrest 195 Ind Cas 15
- Onus on prosecution to prove guilt 42 Cr L J 72
- Pleading 'not guilty' 1941 M W N 6
- Plea of accused—Some examples of, in U. S. A. (1941) 1 M L J 24
- Probation after conviction 194 Ind Cas 20; 195 I C 12; 42 Cr L J 95, 112
- Proper way to admit crime 42 Cr L J 111
- Punishment—Accused prescribing sentence for himself 196 Ind Cas 16; 42 Cr L J 144
- Sentence—Execution—Prisoner coming to life after execution 1941 O W N 3; 1941 R D 1
- Sexual cases—Evidence of prosecutrix
 - Value of 45 C W N 25
- Simultaneous convictions for substantially same offence 194 Ind Cas 3; 42 Cr L J 65
- Soldier ordered by superior to do unlawful act—Obedience to superior—Whether of itself defence to charge 42 Cr L J 84
- Summary trial—Evidence in rebuttal 193 Ind Cas 9
- Unexplained detention—Bail (1941) 1 M L J 26
- Use of marked coin 42 Cr L J 94
- Wrongful convictions 1941 M W N 60
- Cuming, Herbert—Obituary note 45 C W N 57
- Cyclist—Duty of 191 Ind Cas 40
- Damages—Against the dead—Instance of 43 Bom L R 10; 1941 P W N 29
- Das Gupta S. P.—Death of 7 Cut L T iii
- Defence of India Rules—Conviction under—Effect under Municipal and Local Boards Act 53 M L W 29
- Democracy—Essentials of—Freedom of every citizen to appeal to Courts for injury and insult caused by the misuse of official power must be safeguarded (1941) 1 M L J 110
- Doctor—Who is—In opinion of lawyer he is one who does not consent to suffering a recovery 1941 O W N 6; 1941 R D 4
- Drunkenness—Proper test of 22 P L T 83; 194 I C 31; 42 Cr L J 93
- Dunning—Case argued for opposite side by mistake—Effect tactfully nullified 1941 A W R 3; 22 P L T 84; 1941 P W N 59
- Dutta, B. N.—Death of 7 Cut L T 1
- Dutt, K. B.—Death of 45 C W N 105; 22 P L T 49; 1941 P W N 35
- Eldon, Lord—Embodiment of equity (1941) 2 M L J 89
- Ellesmere, Lord Chancellor—'Having both his hands to a petition' 1941 O W N 6; 1941 R D 4

- Ellesmere, Lord
—His jests 1941 O W N 6; 1941 R D 4
- Erskine—His treatment of witness 42 Cr L J 92
- Evidence—Appreciation of 43 Bom L R 63
- Crown privilege in regard to official papers 195 Ind Cas 17
- Law of, in ancient India (1941) 1 M L J 80
- Evidence Act (1 of 1872), S. 90 — Bill to amend 1941 A L J 58, 66; 54 M L W 5; 1941 M Cr C 1
- S. 90—Need for amendment of 194 Ind Cas 17; 42 Cr L J 86
- Execution — Portion of decree for which execution not claimed — Whether can form part of subsequent claim in execution: ILR(1940)2 Cal 520; (28) A I R 1941 Cal 205 reviewed: (1941) 1 M L J 19 (NIC)
- Factories Act(1937)—Technical institutes —Whether come under Factories Act 1941 P W N 41; 194 Ind Cas 28; 42 Cr L J 94
- Fazl Ali, Sir Syed — Knighted—Felicitations 22 P L T 1; 1941 P W N 1
- Federal Court — An ultimate Court for Indian appeals 53 M L W 21
- Expansion of the powers of A I R 1941 J 1
- Expansion of the appellate powers of —Some objections answered A I R 1941 J 27
- Judgment of — Not helpful to High Courts 45 C W N 49
- Judgments of — Conflicts in 45 C W N 53, 61
- Judgment of—Mistake on a question of date 45 C W N 54
- Procedure in appeals A I R 1941 J 3
- Separate judgments in— Not improper 53 M L W 21
- What it is and its powers A I R 1941 J 86
- Fletcher, Sir Earnest Edward—Death of 45 C W N 25
- Fraud—Court should not allow itself to be made instrument of fraud: (28) A I R 1941 Bom 274 (F B) reviewed 54 L W 43
- Gentle, Justice—Appointment as Judge of Calcutta High Court — Farewell at Madras 54 M L W 47; 1941 M W N 64
- Ghose, Asita Ranjan—Sudden death of 45 C W N 113
- Gift—Donatio mortis causa in war time —Essentials 192 Ind Cas 9
- Gokhale, S. B.—Death of 1941 N L J 61
- Government of India Act (1935, 25 and 26 Geo. V, Ch. 42), S. 205—Certificate under 45 C W N 232=(27) A I R 1940 P O 230 (PC) commented upon 45 C W N 33; 53 M L W 13
- S. 270—Protection to Crown servants under 22 P L T 5
- Great Seal—Delivery of the Great Seal to the Lord Chancellor 191 Ind Cas 35
- Damasking the Great Seal 191 Ind Cas 36
- Origin of 191 Ind Cas 35
- Gregory, Walter—Death of 45 C W N 97
- Habeas corpus — And emergency regulations 1941 M W N 30
- Does the writ lie for a procedural defect 1941 M W N 35
- Writ of—Exercise of 191 Ind Cas 32
- Writ of—Grounds for 191 Ind Cas 44
- Writ of—Validity of order 42 Cr L J 45
- Happell—Appointment as Judge: 1941 M W N 61
- Harbouring offender—Offence of—Motive immaterial 42 Cr L J 46
- Hardwicke, Lord—Early career of (1941) 1 M L J 25
- Heward, Lord—Retirement of: (1941) 1 M L J 52; 1941 P W N 12
- Hindu law—Adoption—Death of A, leaving widow, son and son's widow — Death of son leaving widow and infant son — Death of infant son and subsequent death of its mother — Death of first widow (A's wife)—Son's widow succeeding and adoption — Validity and effect of adoption: (25) A I R 1938 Bom 383 commented upon A I R 1941 J 92
- Adoption — Dwayamushayan — Origin of 1941 A L J 100
- Adoption — Oral adoption of daughter's son — Validity: (1939) 2 M L J 557=(26) A I R 1939 Mad 849 commented upon 43 Bom L R 73
- Adoption — Right of adopted son to challenge alienation by adoptive mother prior to adoption of property vested in her as heir to her predeceased son: (1941) 2 M L J 134=(28) A I R 1941 Mad 699 commented upon: (1941) 2 M L J 25 (NIC)
- Adoption — Adoptee and adopter belonging to different sub-castes — Validity of adoption: I L R (1941) 1 Cal 457=(28) A I R 1941 Cal 20 commented upon (1941) 2 M L J 39 (NIC)
- Adoption — Adoption of illegitimate son 53 M L W 23
- Adoption — Widow's motive — How far relevant: 54 M L W 587=(28) A I R 1941 Mad 937 commented upon 54 M L W 48
- Applicability to the Jainas: A I R 1941 J 79
- Codification of 1941 N L J 41
- Debts—Alienation by father — Onus of disproving consideration on sons: 52 M L W 310=(27) A I R 1940 P O 114 (PO) commented upon 53 M L W 15
- Hindu Law Committee — Answers to questionnaire (1941) 1 M L J 113
- Joint family — Insurance effected by member of joint family A I R 1941 J 43
- Joint family — Pronote in name of family firm — Whether coparcener can in his individual name institute suit to recover debt: I L R (1940) Bom 153=(27) A I R 1940 Bom 164 commented upon (1941) 1 M L J 35 (NIC)
- Law of self-help in ancient Hindu Law 195 I C 13; 42 Cr L J 108
- Marriage—Law of—Effect of Special Marriage Act on A I R 1941 J 22
- Marriage—Prohibited degrees of 1941 J 82
- Marriage—Sagotra marriages: 43 Bom L R 39
- Marriage — Inter-caste marriages — Validity: (1941) 1 M L J 724=(28) A I R 1941 Mad 513 commented upon (1941) 1 M L J 31 (NIC)
- Marriage — Anuloma marriage — Validity in Madras Presidency: 1941 M W N 17
- Mimansa Rules of Interpretation A I R 1941 J 68
- Partition—Suit for — Whether and when mortgagee from a coparcener of his share is entitled to come in: (1940) 1 M L J 97=(27) A I R 1940 P O 11 (PO) commented upon (1941) 1 M L J 1 (NIC)

Hindu law

- Partition — Proof of—Alienation by coparcener of his share in whole of joint family property or in part thereof—Whether severs his status: (1940) 2 M L J 1021=(27) A I R 1940 Mad 217 commented upon (1941) 1 M L J 14 (NIO)
- Partition—Mere reference to interests in particular properties by fractional shares is not sufficient: (1941) 2 M L J 58=(28) AIR 1941 PC 48 (PC) commented upon (1941) 2 M L J 7 (NIO)
- Pre-emption under 73 O L J 58
- Religious endowment — Negligent guardians—Whether idol is entitled to protection 45 O W N 145
- Religious endowment—Alienation of trusteeship of 53 M L W 23
- Some aspects of A I R 1941 J 14
- Succession—Rights of a Hindu coparcener murdering his father 43 Bom L R 33
- Succession—Review of memorandum on Hindu Law of Succession issued by the Hindu Law Committee (1941) 2 M L J 37
- Succession—Joint status—Whether a ground of preference: (28) AIR 1941 Nag 297 commented upon 54 M L W 43
- Widow—Unchastity — Whether disables her from inheriting as widow of gotraja sapinda 53 M L W 22
- Widow's estate—Some observations: (27) AIR 1940 All 403 commented upon A I R 1941 J 4
- Women's rights to agricultural land —Bill 1941 A L J 89
- Hindu Law of Inheritance (Amendment) Act (2 of 1929), S. 1—Jains are Hindus —Law of Mitakshara includes Mayukha school: I L R 1941 Bom 250=(28) AIR 1941 Bom 235 reviewed: (1941) 2 M L J 22 (NIO)
- Hindu Women's Rights to Property Act (18 of 1937)—Federal Court and this Act 45 O W N 131
- Effect of, on agricultural land 1941 N L J 55
- Right of succession of Hindu widows depends on situs of property also and not merely on its character: (1941) 2 M L J 12=(28) A I R 1941 FC 72 (FC) commented upon (1941) 2 M L J 4 (NIO)
- Whether applies to agricultural lands 1941 A L J 54; 74 O L J 1
- The Federal Court on 45 O W N 105, 107
- Humour—And law books 191 I O 7
- Husband and wife — Divorce—Husband and wife not getting on well—Whether good ground (1941) 2 M L J 90
- Husband's right to bury his wife 191 I O 29
- Matrimonial home—What is 195 I O 8
- Imam, Naqui—Appointed as District and Sessions Judge 22 P L T 3
- Income-tax—Appellate Tribunal—Judicial members of (1941) 9 I T R 1
- Deduction — Whether company can claim to deduct the potential value of new shares issued as a bonus to its employees at par below the market value of the shares (1941) 1 M L J 3
- Deductions — Litigation expenses 53 M L W 31
- Payments made by publishers to authors—Whether assessable 191 I O 41
- Taxation of unrealized income (1941) 9 I T R 51

- Income-tax Act (11 of 1922), S. 16 (3) (a) (iii)—Effect of, on transfers to wife out of affection 53 M L W 14
- S. 54 — Certified copies of returns—Admissibility: (1941) 1 M L J 617=(28) A I R 1941 Mad 709 commented upon (1941) 1 M L J 28 (NIO)
- Income-tax Rules, R. 7 — Need for amendment of 45 O W N 30, 31
- Index—Utility of 1941 A W R 28
- Value of (1941) 1 M L J 72
- India — India and the Atlantic Charter (1941) 4 F L J 37
- Indian constitution — India's future constitution—Amery's speech (1941) 4 F L J 47
- Provincial Legislature — Power of to entertain bills dealing with federal subjects (1941) 4 F L J 5
- Statement of 'non-party' leaders of India on (1941) 4 F L J 42
- Viceroy on (1941) 4 F L J 61
- Interpretation of Statutes—Penal enactments—Retrospective effect 42 Or L J 118; 195 Ind Cas 22
- Retrospective effect of penalty sections 194 Ind Cas 6; 42 Or L J 66
- War legislation — Construction of 196 Ind Cas 13
- Iqbal Ahmad — Appointment as Chief Justice—Installation ceremony 1941 A L J 69
- Appointed as Acting Chief Justice—Felicitations 1941 A L J 21; 1941 A W R 10
- Appointment as Chief Justice of Allahabad High Court 1941 A L J 53; 1941 A W R 19
- Jayakar, M. R.—Resignation of membership of Judicial Committee 45 O W N 137
- Jeffreys, George—And the witness 42 Or L J 92
- Jew—What is 194 Ind Cas 32
- Jogesh Ohandra Roy—Death of—Tributes to the departed 45 O W N 45
- Judge—Appointment of—Claims of local bar should not be passed over 45 O W N 121
- Bias—Allegation of 43 Bom L R 7
- Dress — Court dress in the United States 1941 M W N 43; 193 I O 23
- Dress — Dispensing with, in hot summer 193 Ind Cas 24
- Dress—Expenditure for 193 Ind Cas 23
- Gentler Judges—Instances 1941 A W R 3
- High Court Judge — Extension of term of 45 O W N 15
- Judges whether to take part in departmental inquiries on matters which are likely to come up before Court 45 O W N 113
- Loss of temper of — King's satire on 1941 O W N 5; 1941 R D 3
- New Judge—Expenditure of: 1941 M W N 43
- Retired Judges and further service (1941) 1 M L J 72
- Jury—An improper and unjustified attack on trial by jury in India by a Sessions Judge 45 O W N 57
- Justice — What is 22 P L T 75; 42 Or L J 88
- Juvenile offender — Cause and treatment of — Influence of parents on children 194 Ind Cas 8
- Juvenile delinquency—Causes of 194 Ind Cas 35; 42 Cr L J 96, 110
- Kenyon, Lord — His career in the office of an attorney (1941) 1 M L J 25; 1941 M W N 7
- Khurshaid Husnain—Death of 1941 P W N 53; 22 P L T 69

- Knowledge—Tax on 43 Bom L R 25
 Kunhi Raman — Appointment as Judge
 54 M L W 5; 1941 M W N 61
 Kuppaswami Iyer, Justice—Appointment
 as Judge 54 M L W 48; 1941 M W N 90
 Kuttikrishna Menon — Appointed as
 Government Pleader — Felicitations
 53 M L W 19; 1941 M W N 33
 Lakshmana, Ganti — Unveiling the
 portrait of (1941) 1 M L J 101; 53 M L W 33
 Landlord and tenant—Ejectment for non-
 payment of rent 45 O W N 34, 95
 —Prepaid rent paid to lessor—Whether
 valid against receiver appointed in res-
 pect of properties including leased pro-
 perty 191 Ind Cas 2
 Land tenure—Jocular tenures 191 Ind Cas 7
 —Services to be done by vassal in olden
 days 191 Ind Cas 8
 —Some quaint tenures 191 Ind Cas 8
 Latin — Lord Wrights' protest against
 introduction of Latin tags 192 Ind Cas 24;
 42 Cr L J 44
 —Use of, by medical men 192 Ind Cas 24
 Larceny—Essentials of offence 192 Ind Cas 35
 Law—Jocular references about; (1941) 1 M L J 71
 —Law and lawyers in literature
 (1941) 1 M L J 71; 193 Ind Cas 7, 8,
 42 Cr L J 63, 64; 1941 P W N 34
 —Novellists and the law 196 Ind Cas 19;
 42 Cr L J 143
 —Pronunciation in 53 M L W 11;
 192 Ind Cas 8; 42 Cr L J 31; 1941 P W N 14
 —Uncertainties of 1941 M W N 5
 —What is 1941 P W N 34; 42 Cr L J 64
 Law books—Tax on 22 P L T 33
 Law Reports—Citation of—Madras High
 Court circular regarding citation of
 cases explained 1941 M W N 89
 —Citation of—Approved list 1941 O W N 13
 —Duty of editors 1941 O W N 13
 Lawyer — Abraham Lincoln's advice to
 young lawyers 1941 M W N 24
 —Lawyers' right of audience and pri-
 vileged Courts A I R 1941 J 19
 —The seven lamps of—A lecture by V.
 V. Srinivasa Iyengar 54 M L W 10
 —What he is 1941 M W N 8
 Legal Practitioner—Arguments—Counsel
 inventing an impressive phrase: 1941 O W N 8;
 1941 R D 6
 —Case for opposite party argued by
 mistake—Effect nullified by subsequent
 argument — Instance of 43 Bom L R 26
 —Correcting Counsel in consultation
 1941 O W N 7; 1941 R D 5
 —Counsel confronted with opinion of
 his own 1941 O W N 7; 1941 R D 5
 —Counsel's apologue to a bigoted jury
 1941 O W N 8; 1941 R D 5
 —Instance of a barrister arguing both
 for appellant and respondents 1941 A W R 3;
 43 Bom L R 11
 Legal profession — Absence of, in society
 — Effect (1941) 1 M L J 109
 —Are lawyers mercenary? 196 Ind Cas 20;
 42 Cr L J 143
 —Migration in the profession (1941) 1 M L J 24
 —Retiring age for lawyers 45 O W N 1, 2
 Legal Terminology — How it appears to
 outsiders 42 Cr L J 44
 —Some instances 192 Ind Cas 28
 1941 Indexes (Journal)—2 (4pp.)
 Legislation — Referential legislation —
 Defects of 45 C W N 73
 Letters Patent (Madras), Cl. 15—Whether
 Judge granting leave can limit points :
 (1941) 1 M L J 800 (FB) commented
 upon (1941) 2 M L J 3 (NIC)
 Libel—Accidental libel 43 Bom L R 59
 —Criminal proceedings for 42 Cr L J 46
 —Criminal prosecution—Whether pro-
 per remedy 192 Ind Cas 28
 Limitation Act (9 of 1908)—Applicability
 to proceedings before arbitrators under
 Bombay Co-operative Societies Act
 43 Bom L R 42
 —S. 12—Time taken to supply further
 stamps and folios 45 C W N 82
 —Ss. 19, 20—Part payment and acknow-
 ledgment 54 M L W 17, 21
 —S. 20—Part payment and limitation
 A I R 1941 J 27
 —S. 20—"Paid as such" — Meaning :
 (27) A I R 1940 PC 63 reviewed: AIR 1941 J 97
 Littledale, Justice—Noted for his puncti-
 lousness of expression—Instances of
 (1941) 1 M L J 52; 1941 P W N 14
 Lort-Williams, Sir John—Retirement of
 45 C W N 157
 Lottery—Disguised lotteries 192 Ind Cas 15;
 42 Cr L J 30
 —What is a lottery 43 Bom 63
 MacKinnon, Lord Justice—As an author
 (1941) 1 M L J 107
 Malins, Vice-Chancellor — Quaint stories
 about (1941) 2 M L J 34
 Madras Agriculturists Relief Act (4 of
 1938)—Certain anomalies in AIR 1941 J 67
 —Ss. 9, 13 — Debts incurred after Act
 in renewal of debts incurred prior to
 Act: (1941) 2 MLJ 307=54 MLW 229=
 (28) AIR 1941 Mad 799 commented upon
 54 M L W 28, 30; (1941) 2 M L J 17 (NIO)
 —S. 9 — Scaling down debts incurred
 after 1st October 1932 : 54 M L W 551
 =(29) AIR 1942 Mad 204 (2) commented
 upon 54 M L W 50
 —S. 9 Proviso — Renewal of debt con-
 tracted after 1932—Whether proviso
 applies: 54 MLW 551 = (29) AIR 1942
 Mad 204 (2) commented upon 54 M L W 45
 —S. 28—Rules under, Rule 8 — Ultra
 vires, nature of : (1941) 1 M L J 164=
 (28) AIR 1941 Mad 295 (FB) commented
 upon (1941) 1 M L J 7 (NIO)
 —S. 28 — Case for a Validation Act
 regarding the rule providing for appeals
 under the Act (1941) 1 M L J 31
 Madras Debt Conciliation Act (11 of
 1936)—Broad features of 53 M L W 34
 —A short study (1941) 2 M L J 12
 —Need for amendment (1941) 2 M L J 10
 Madras Debt Conciliation Board—Abuse
 of powers by statutory tribunals 54 M L W 14
 Madras Estates Land Act (1 of 1908),
 Ss. 6, 181 — Absolute transfer of kudi-
 varam right by land-holder—Whether
 there is conversion of land into ryoti:
 (1941) 1 MLJ 386=(28) AIR 1941 Mad
 367 (FB) commented upon
 (1941) 1 M L J 13 (NIC)

- Madras Estates Land Act
—S. 9—Right of eviction—When available to land-holder: (1941) 1 M L J 523
=(28) A I R 1941 Mad 600 reviewed
(1941) 1 M L J 24 (NIO)
- Madras High Court—Arrears in—Statement of (1941) 2 M L J 109; 54 M L W 51
—Increase in number of Judges: (1941) 2 M L J 1;
54 M L W 9
- Madras High Court Rules (Appellate Side), Rule 12B—Need for amendment of (1941) 2 M L J 61
- Madras Land Encroachment Act (3 of 1905), S. 9 — Mode of recovery — Property sold — Whether free of incumbrances: (1941) 2 M L J 993=(29) A I R 1942 Mad 244 commented upon
(1941) 2 M L J 41 (NIO)
- Madras Law Journal — Golden Jubilee of —Felicitations 45 O W N 25
- Malabar Tenancy Act (14 of 1930), Ss. 14 and 20 — "Requires bona fide"—Meaning of: (1941) 2 M L J 455=(29) A I R 1942 Mad 242 reviewed: (1941) 2 M L J 20 (NIO)
- Mansfield, Lord—In jocular mood (1941) M W N 23
- Marriage — Desertion — What amounts to 191 Ind Cas 26
—Dissolution — Party presumed to be dead subsequently found to be living 191 Ind Cas 25
—Divorce—Grounds — Cruelty in law —What is 192 Ind Cas 6
—Separation agreement and decree of nullity 194 Ind Cas 31
- Master and pupil—Duty of school masters to their scholars 196 Ind Cas 31
- Master and servant—Liability of hirer of motor car for crimes committed by servant 43 Bom L R 62
- Mathura Prasad, Chowdhry—Death of 1941 P W N 49; 22 P L T 59
- Maxims — 'De minimis non curat lex'—How a lawyer drew the attention of the Judge by the use of this maxim 1941 O W N 6; 1941 R D 4
—'Res ipsa loquitur' — Application of and onus of proof 194 I C 9
—"The case is altered, quoth Plowden"—How it arose 1941 O W N 6; 1941 R D 4
- Minerals—Right to, in permanently settled estates (1941) 1 M L J 33
- Minor—Succession certificate to guardian of a minor: (20) A I R 1933 Bom 436 discussed A I R 1941 J 105
—Transfer of property belonging to—Protection of minor's interests — Suggestion for 1941 A L J 9
—Mitra, A. K.—Obituary note—Reference in Court 1941 P W N 63; 22 P L T 79
- Monir, Mohammad — Appointed as President of Income-tax Appellate Tribunal 9 I T R 1, 2
- Mortgage—Redemption — Whether principle de minimis non curat lex applies: (1941) 1 M L J 788; (28) A I R 1941 Mad 484 (FB) commented upon (1941) 2 M L J 1 (NIO)
—Subrogation — Mortgage discharged by payments made at different times by two different persons—Who is entitled to subrogation: (1941) 1 M L J 519; (28) A I R 1941 Mad 563 reviewed (1941) 1 M L J 23 (NIO)
- Mortgage
—Usufructuary — Redemption and accounting 1941 A L J 49, 85
- Motor Vehicle — Motorists giving lifts to belated road farers—Implications of 192 I C 13
—What is 195 I C 16
- Mudholkar, J. R.—Appointment as District Judge 1941 N L J 56
- Murder — Evidence — Circumstantial evidence held not sufficient (1941) 1 M L J 11
- Negligence—Water company not closing pipe and house flooded — Liability 43 Bom L R 9
- Norway — Occupation by Germany — Resignation of members of Norwegian Supreme Court 194 I C 29; 42 Cr L J 105
- Nuisance—Liability for — Whether independent of knowledge 43 Bom L R 9
—Nuisance caused by third party—Occupier, if under obligation to abate the nuisance 43 Bom L R 9
—Nuisance and knowledge 192 I C 33
—Temporary — Whether actionable 193 Ind Cas 21
- Numbers—Importance of 7 in law: 42 Cr L J 107
- Pandrang Row J. — Retirement of (1941) 1 M L J 79, 103; 53 M L W 37; 1941 M W N 61
- Payment of Wages Act (1936) — Certain defects 73 O L J 75
—S. 2 (vi) — "Wages" — Scope of A I R 1941 J 49
—S. 9 (2) — Non-payment of wages for holiday 43 Bom L R 44
- Penal Reform—A problem for practical penal reformers 42 Cr L J 25
- Police—Assisting the police — Need for 194 Ind Cas 4
—Interference of, in petty cases A I R 1941 J 100
—Policeman—When can be said to be in execution of his duty 42 Cr L J 46, 47
—Refusing to assist police 192 Ind Cas 12, 42 Cr L J 89
- Pollock, Baron—His jokes (1941) 2 M L J 35
- Pollock, Sir Edward — Short sketch on (1941) 2 M L J 92
- Pollock, Sir Frederick—Interesting incident about his conducting a case: 53 M L W 27
- Practice—Amendment—Alteration in defendant's name and address in summons 195 Ind Cas 20
—Arguments — Repetitions of counsel in 1941 O W N 7; 1941 R D 5
—Delay in Court 195 Ind Cas 16; 42 Cr L J 120
—Second Appeal — Question of omission of Court to consider a statutory presumption—Finding on—Whether can be interfered in second appeal 53 M L W 13
- Precedents—Counsel citing fictitious cases 1941 O W N 7; 1941 R D 5
—Probative value of and their modus operandi 42 Cr L J 76
—Value of — A lecture by Sir Gilbert Stone 1941 N L J 11
- Pre-emption—Law of, in Berar — A few suggestions 1941 N L J 57
- Presidency Towns Insolvency Act (3 of 1909), Ss. 11, 14 — Disqualified proprietor — Whether entitled to order of adjudication: I L R (1941) 1 Cal 818=(28) A I R 1941 Cal 505 commented on (1941) 2 M L J 44 (NIO)

GENERAL INDEX

- Presidency Towns Insolvency Act
 —S. 13 (4)—Decree—Whether conclusive proof of existence of debt: (1941) 2 M L J 15
 Principal and agent—Liability of principal on agent's promissory note 58 M L W 24
 Prison—Prison reform (1941) 2 M L J 16
 Privy Council—Appeals to 191 Ind Cas 33
 —Criminal appeals to 45 C W N 141, 143; 22 P L T 7, 89; 42 Cr L J 21; 54 M L W 13
 —How it works during air raids: 45 C W N 89
 Radhabind Pal—Appointment as Judge
 —Felicitations from the bar 45 C W N 41, 46
 Radio—Radio in car — An offence under Defence Regulations 191 I C 44; 42 Cr L J 31; 1941 P W N 13
 Rajagopalachari, N.—Death of (1941) 2 M L J 9
 Registration Act (16 of 1908), S. 17 (2)(vi)
 — "Subject-matter of suit or proceeding"—Meaning: I L R 1941 Bom 34= (28) A I R 1941 Bom 1 reviewed (1941) 2 M L J 23 (NIC)
 Religious Endowment—Gift for religious purposes—Whether charitable 196 Ind Cas 1
 —"Religious purposes"—Meaning of 196 Ind Cas 17
 Res judicata — Co-defendants — Basis of decision in (19) A I R 1932 P O 161 — What is 1941 A L J 5
 —Co-defendants—Conditions: (27) AIR 1940 Cal 377 commented upon 1941 A L J 37
 Roy, G. C. — Death of 7 Cut L T Part 3
 Russel, Lord of Killowen — An awkward ambiguity (1941) 2 M L J 89; 22 P L T 82
 Satyamurti Iyer, Rao Bahadur—Appointed as one of the Judicial Members of the Income-tax Appellate Tribunal (1941) 9 I T R 1, 3, 32
 School — Punishment in — Corporal punishment to be abandoned 196 Ind Cas 16
 Scarlet, Sir James—A short life-sketch of (1941) 1 M L J 107
 Scotch Highlander—His craving for news
 — Instance of 1941 R D 1
 Sedition.—At common law 42 Cr L J 126
 —Meaning of 194 Ind Cas 21; 42 Cr L J 81
 —What amounts to 195 Ind Cas 83
 Sen, S. K. — Death of 45 C W N 169
 Sen, S. P. — Death of 22 P L T 45; 1941 P W N 33
 Seven—Importance of, in law 195 Ind Cas 6
 Sivaswami Aiyar, Sir P. S. — Unveiling of the portrait of, at the premises of the Madras Advocates' Association: (1941) 1 M L J 67
 Speech—Freedom of speech—Free speech
 —What is 192 Ind Cas 17; 42 Cr L J 39
 Srinivasa Iyengar, S. — Death of (1941) 1 M L J 111, 137; 53 M L W 40; 54 M L W 1; 1941 M W N 64
 Statutes—Conferring statutes 1941 R D 2
 —Evading of—What is 1941 R D 2
 Stowell, Lord — His liking for good dinners 1941 M W N 28
 Sulaiman, Sir Shah Mohammad—Death of—Tributes 1941 A L J 31; 1941 A W R 15; 45 C W N 69; (1941) 1 M L J 55; 53 M L W 19; 1941 O W N 7; 1941 P W N 17; (1941) 4 F L J 1, 15
 Sultan Ahmed, Sir Syed — Appointment as Law Member of Viceroy's Executive Council 22 P L T 53; 1941 P W N 39
 Tagore, Rabindranath—Death of: 45 C W N 149
 Tenterden, Lord — Campbell's appreciation of 1941 P W N 27
 —Life of (1941) 1 M L J 27
 Thankerton, Lord—His pronunciations of Scotch names or words 192 Ind Cas 8; 42 Cr L J 32
 —His watch on unorthodox pronunciation of Scotch names 1941 P W N 24
 Theft—A curious theft 1941 A W R 17
 —Larceny—Essentials of 42 Cr L J 42; 192 Ind Cas 35
 —Stealing apples — Common offence committed by children 42 Cr L J 120; 195 Ind Cas 24
 Thomas, George Hector — Conferment of knight-hood—Felicitations 1941 O W N 1
 Thom, Sir John — Obituary note — Reference in Court 1941 A L J 11; 1941 A W R 9
 Tort — Act of God — What is — Frost 194 Ind Cas 25; 42 Cr L J 102
 —Artificial works — Land owner's responsibility 195 Ind Cas 29
 —Common employment — Doctrine of — Origin and growth and decline in England and its application to India A I R 1941 J 73
 —Damages — For personal injuries from unfenced machine 1941 P W N 41; 194 Ind Cas 28
 —Damages for loss of expectation of life 53 M L W 25
 —Damages — Injury on highway — Landlord's responsibility 191 Ind Cas 37
 —Damages — Wife's claim to, for loss of husband's consortium 191 Ind Cas 36
 —Negligence — Animal owner's negligence 43 Bom L R 21
 —Negligence—Duty of highway authority to keep roads safe especially during black-outs 43 Bom L R 26; 1941 P W N 59; 196 I C 8
 —Negligence — Inkeeper's liability for theft from cars outside his hotel 43 Bom L R 24
 —Negligence — Occupiers' liability for animals 196 Ind Cas 83
 —Waiver of 43 Bom L R 10; 1941 P W N 29
 —War risks and the law of tort 193 Ind Cas 49
 Transfer of property — Restrictive covenants—Interpretation of 192 Ind Cas 29
 U. P. Encumbered Estates Act (27 of 1934), S. 7 — Nature of proceedings under: 1938 A W R (H. C.) 924=(25) AIR 1938 All 477 commented upon: 1941 A W R 27
 —S. 12—Annulment of transfers under 1941 A W R 25
 U. P. Municipalities Act (2 of 1916), ss. 186 and 211—Notice for demolition of building sanctioned by Executive Officer—Appeal and second appeal: 1941 A L J 5
 Vendor and purchaser—Purchaser of last of plots of land — Whether entitled to possession of title deeds: I L R (1941) Bom 55=(28) A I R 1941 Bom 48 commented upon (1941) 2 M L J 9 (N I O)
 Verma, Rai Bahadur Ram Prasad — Appointed as one of the judicial members of the Income-tax Appellate Tribunal (1941) 9 I T R 1, 3
 Wadia, B. J.—Retirement of 43 Bom L R 49
 War — As seen through the eyes of an American lawyer 192 Ind Cas 21, 25; 42 Cr L J 33
 —Bad effect of spreading disquieting rumours 192 Ind Cas 28
 —Ethics of warfare 195 Ind Cas 28

War

- Fifth Columnist — Duty of Police 42 Cr L J 145
- German methods—Ethics of 42 Cr L J 136
- Inevitable result of 1941 A L J 2

Watt, Francis—His "The Law's Lumber Room" 195 Ind Cas 19

Wig — Dispensing of on account of heat 1941 M W N 44

—Jettison of a judicial wig (1941) 1 M L J 106;
1941 M W N 43; 193 I O 24

Will—An interesting will 43 Bom L R 64

—Residues — General and particular 192 Ind Cas 11

—Testamentary gifts to classes 193 Ind Cas 1

Willingdon, the late Lord—Obituary note 45 O W N 153

Witness—An interesting medical witness 192 Ind Cas 24

—Classification of 42 Cr L J 92

—Clergymen as witnesses 194 Ind Cas 12;
42 Cr L J 93

—Cross-examination of — Eliciting truth by 196 Ind Cas 22; 42 Cr L J 137

—Cross-examination of — Mysterious art of 196 Ind Cas 3; 42 Cr L J 124

—Jeffreys and the witness 194 Ind Cas 12

—Lying witnesses — Instances of (1941) 2 M L J 92

Witness

—Medical witness who scored over his cross-examining lawyer (1941) 1 M L J 29;
1941 P W N 28; 192 Ind Cas 24

—Medical witness — Some interesting instances 42 Cr L J 45

—Medical witness — Use of technical terms 42 Cr L J 45

—Treatment of, by Erskine 194 Ind Cas 12

—Veracity of 194 Ind Cas 11

—Vultures as witnesses 45 C W N 153

Woman — Her right not to give out her age 22 P L T 14; 191 Ind Cas 8

Words and phrases—"Debt"—Origin and meaning of 194 Ind Cas 1

—Deodands—What are 195 Ind Cas 19, 32

—Examples of some odd expressions used in Courts (1941) 1 M L J 51

—"Fines" and "recoveries"—Use of by Shakespeare in 'Hamlet' 195 Ind Cas 19

—"House hold"—What is 43 Bom L R 62

—Justice—What is 194 Ind Cas 15

Workman's compensation — Disfigurement of injured—Effect of 192 Ind Cas 32

Young offender—Whipping—When to be inflicted 1941 A W R 8

—Whipping of 191 Ind Cas 39; 42 Cr L J 23

Zafarulla Khan, Sir Muhammad — Appointed as Federal Court Judge: 45 O W N 129;

1941 P W N 40; (1941) 4 F L J 63

THE ALL INDIA REPORTER 1941 JOURNAL SECTION

FEDERAL COURT AND PRIVY COUNCIL

by B. BANERJI, M.A., LL.B., *Advocate, Lahore High Court,
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The Government of India have under consideration the question of expansion of the appellate powers of the Federal Court and investing the Court with the jurisdiction to hear appeals which now go to the Privy Council. In the early part of this year the Government circularized the proposal to the different High Courts and their Bars and the support given to the proposal was overwhelming. Only Calcutta is reported to have opposed it but public opinion in Bengal and in Calcutta itself, as voiced by their representatives in the Central Assembly, is entirely at one with the rest of the country.

It is to be hoped that the Government will accelerate the snail's pace of red-tapism in this matter. My reason for doing so is not merely the sentimental ground of making India self-dependent in the judicial sphere though it is an all important and all embracing reason in itself. It is not even the difficulties of communication due to war, though I know of at least one High Court whose Privy Council section has not received any communication from London for months. My reason to-day is that the working of the Court has shown that such extension is imperative in the interests of the Court itself.

The Federal Court was designed, in the first instance, to settle questions of constitutional law of India. It was invested with three jurisdictions, advisory, original and appellate. In the advisory jurisdiction it gives opinions on questions of law referred to it by the Governor-General in his discretion. During more than three years of its existence it has been asked to give such

opinion only once, *i. e.* with respect to the validity of the C. P. Petrol Tax Act. In its original jurisdiction the Court decides disputes between Federal units inter se or between one Federal unit and the Centre. At the present moment the Federal units are the provinces. So far the U. P. Government has invoked the original jurisdiction of the Court in one case, namely, the Cantonments case. Whatever little work that the Court has got is in its appellate jurisdiction. The appellate decisions of the Court were meant to have some degree of finality, and appeal to the Privy Council lies only with the special leave of the Federal Court or of the Privy Council. Recently the Privy Council has ruled that it will give such leave only in a "substantial case."

Now, what is the result? The first result is that we have two final appellate authorities for the Indian cases, the Federal Court and the Privy Council. This in itself is an evil which should be done away with with the least possible delay. If it is said that the Privy Council and not the Federal Court remains the sole final appellate authority, as appeals lie to it even though by special leave, then my answer is that to interpose another Court between the High Court and the Privy Council is a greater evil less to be tolerated. What Indian opinion demanded, and Mahatma Gandhi as the sole representative of the Congress gave forceful expression to it, was not the addition of a fifth wheel to the Indian judicial machinery but a real final Appellate Court.

The appealable decisions of the Indian High Courts are, under the present law,

divided into two categories. From one category the appeals lie to the Federal Court, from the other to the Privy Council. The existence of a constitutional point, and a certificate of the High Court that such a point is involved, constitutes the line of demarcation. What does this lead to? It means that the Federal Court decides constitutional points, but if it is a case under the ordinary civil law the appellant is forced to go to London to seek justice. This may be put from another point of view in this way: If a constitutional point is involved the appellant must seek justice in a lower Court, if it is not involved he can have justice from the highest tribunal in the Empire. Looked at from any point of view it is a glaring anomaly. This anomaly can be removed either by making all decisions of the Federal Court appealable to the Privy Council or by transferring the Privy Council appeals to the Federal Court. In the first alternative it means turning the Federal Court, as I have said above, into a fifth wheel in the Indian Judicial machinery. In the second alternative the Federal Court must be transformed into a real Supreme Court for India. It is not difficult to see which alternative is the more desirable one.

I need not take up your space in telling you of cases in which the line of demarcation became blurred as the constitutional point which was in existence in the High Court stage ceased to be of any practical importance because of subsequent legislation when the appeal reached the Federal Court. In such cases the Federal Court exercises virtually Privy Council jurisdiction. Ninety per cent. of cases before the Court however are appeals of Privy Council nature with the constitutional point added. If the Federal Court can be trusted to decide such appeals, it passes one's understanding why it cannot be relied on to decide appeals of Privy Council nature without the constitutional point. It should be noted here that once an appeal involves a constitutional point and is before the Federal Court, the Court is seised of and decides the whole appeal and not merely the constitutional point.

Finally, about the Court's decisions on constitutional questions. Such decisions are of very far-reaching importance. Some of them may affect the whole course of legis-

lation in the dozen Legislatures created by the Constitution Act. Others may involve rights and liabilities affecting whole classes of the population numbering hundreds of thousands and even millions. It is being increasingly felt that a Court composed of the minimum number of three Judges and sitting only for fifteen or twenty days in a year cannot inspire that confidence in its decisions of such importance which it should inspire. The Privy Council is clothed with hoary traditions. Almost invariably five members of the Council take part in deciding constitutional law cases coming from Canada. Even so its decisions have not escaped criticism at the hands of influential circles in Canada. The Federal Court suffers from another disadvantage. It sits in appeal over the decisions of High Courts which command unique prestige among the Indian population. The High Court decision under appeal in the Federal Court may well be a decision of a Bench of five or even seven Judges. It hurts one's sense of proportion that only three Judges should decide such an appeal. It is imperatively necessary that there should be more Judges on the Federal Court Bench even for exercising the limited jurisdiction that is to-day vested in the Court. With the foresight that is his Sir Tej Bahadur Sapru pointed out in the Round Table Conference

that a purely Federal Court of three or four Judges would not be likely to carry much weight while a bigger Court of nine or twelve Judges would command confidence and attract talent.

It is a pity that this sage advice was disregarded when the Federal Court was launched. But we cannot have a dozen eminent Judges to decide only three or four appeals in a year. The logical conclusion is that we should have more Judges and a wider appellate jurisdiction for the Federal Court.

In this article I have confined myself to the effective functioning of the Federal Court only, and have avoided all side-issues. But one matter I cannot but touch upon. It is the question of expense. It is said that the appointment of a large number of Judges will be an intolerable burden on the exchequer. But it is forgotten that the litigant pays in stamps and court-fees not only the entire cost of administration of justice in India but makes a contribution to the general revenues. It is time that he gets adequate return for what he pays.

by B. Banerji, M. A., LL. B., *Advocate, Lahore High Court,*
and *Agent, Federal Court, Delhi.*

The Adaptation of Laws Order in Council made the procedure in Privy Council appeals applicable to appeals in the Federal Court. The bill which Dr. P. N. Banerji has introduced in the Central Legislative Assembly seeks to repeal the provisions added to the Indian law by the Adaptation Order and restore the *status quo ante*. It is a measure that should be welcome to both the profession and the public alike.

Half the utility of having the supreme appellate tribunal in the country is gone if the Privy Council procedure is made applicable to it. Under that procedure it should take from one to two years after the High Court decision before an appeal from the High Court reaches the Federal Court. What justification can there be for such dilatory procedure? It may be necessary in the case of a Court situated overseas, for a lot of preliminary work has got to be done in this country. There can be no necessity for it in the case of a Court which sits in the capital of India. Indian publicists have demanded a Supreme Court for India on the very ground of avoidance of delay, for justice delayed is justice denied. True it is that the Federal Court is not yet a Supreme Court. The number of appeals coming before it is limited. But there are two things to be considered. The first is that sooner or later it is bound to be a full-fledged Supreme Court. Secondly, the appeals coming up before it are those in which constitutional points are involved. The decisions on those points concern not only the litigants before it but a much wider public. More often than not the Legislatures themselves are interested in them for the question of powers of a Legislature is very often involved in the case. Again a High Court decision so long as it stands is binding on the subordinate Courts. Suppose a High Court decision is upset by the Federal Court after three years. In these three years hundreds of cases may have been decided throughout India on the basis of the High Court decision. One can very well appreciate the consequences of such a state of things. What I have written is not what might have been, but what has actually happened in my experience of work in the Federal Court.

A newspaper article is not the proper place for discussing the legal aspects of the case. I would only touch on them in a language easily understandable, I hope, by the

layman. The Indian laws were adapted by Order in Council for the purpose of "bringing the provisions of that law into accord with the provisions of the Constitution Act, and in particular, into accord with its provisions which reconstitute under different names, governments and authorities in India." Now, the Federal Court is not an authority in India which had existed before and which was reconstituted under a different name. It was an entirely new creation. It may be said that the Federal Court was given some of the jurisdiction of the Privy Council which may be said to be an authority in India, as it has in the contemplation of the law no location, for the sovereign is present throughout the Empire, and it is only for the sake of convenience that the Privy Council sits in London. But even if by this far-fetched argument it may be said that the Privy Council is an authority in India, the Federal Court cannot be described as "the Privy Council reconstituted under a different name." The Federal Court is a Court of record, while the Privy Council is not a Court at all but an advisory council of the sovereign. The change is not only that of name, but in fundamental nature. And can the change at all be said to be "reconstitution"? In my opinion the Order-in-Council went beyond the scope of the section under which it was made.

The Adaptation of Laws Order has not only made the procedure of Privy Council appeals applicable to the Federal Court, but has also adapted the provisions about the substantive right of appeal to the Privy Council and made applicable to the Federal Court as well. Now, the Federal Court under the Constitution Act hears appeals from the "judgment, decree or final order of a High Court" if certain conditions are satisfied. The Indian law provides for appeal to the Privy Council "from any decree or final order passed on appeal by a High Court, or by any other Court of final appellate jurisdiction." To the layman the two provisions may appear to be very much the same; but the eyes of a trained lawyer may find fundamental differences in the difference in language. For instance it is an arguable point — I will not put it higher than that — that by the addition of the word "judgment" in the section of the Constitution Act the Parliament intended to invest the Federal Court with wider statutory

powers than the Privy Council, and that the Parliament did so because while the Privy Council can allow appeal to itself by granting special leave, the Federal Court has no such power. It may very well be argued that because of this additional word the Federal Court can hear appeals from the opinions given by the High Court to a subordinate Court on a question referred to it by such Court. Again this is not an academic question at all. The Calcutta High Court gave its opinion on the interpretation of the word "Government" in a sedition case and the Bombay High Court similarly gave its opinion in another case involving the interpretation of the Constitution Act. Some enterprising litigant may have it pressed on the attention of the Court that by the addition of the word "judgment" Parliament intended to give him the right to have the High Court opinion tested by the Federal Court before it is acted upon by the subordinate or the trial Court. If the litigant has got such a right why should the Adaptation Order seek to deprive him of that right? I use the words "seek to deprive" advisedly, for whether they do actually deprive anybody of any rights by cutting out words from the Constitution Act may well be a matter for decision by the Courts, should Dr. Banerji's Bill fail to pass into law.

In one respect the Adaptation Order extends the right of appeal of the Federal Court, for in exceptional cases under the Indian statutory law (which has been made applicable to the Federal Court) an appeal

may lie to the Privy Council (and therefore to the Federal Court) even from an appellate Court other than the High Court. No lawyer can have any doubt whatsoever that the Federal Court cannot entertain any such appeals, any provisions of the Adaptation Order notwithstanding. In short, the Adaptation Order, by adapting Indian statutory law, cannot add to or detract from the jurisdiction of the Federal Court. Then why should such law be so adapted at all? For the moment I am leaving out of consideration whether it can legally be adapted at all.

Now about the adaptation of the procedural law. Under the Constitution Act the Federal Court has been given powers to regulate the practice and procedure of the Court. It is again arguable that by implication no other authority can competently lay down the procedure for the Federal Court. The Constitution Act does not give powers to any Legislature in India, whether provincial or central, to legislate about the jurisdiction and powers of the Federal Court except within the limited sphere allowed by the Constitution Act itself. Dr. Banerjee's Bill if passed into law, will cut the Gordian knot by one stroke, and the least service that it will do will be to make it unnecessary for the Courts to decide various questions that are bound to arise if the law applicable to the Privy Council appeals continues to apply to the Federal Court, created by, and bound by the various provisions of the Constitution Act.

Some observations on the Hindu law of widow's estate as enunciated by the recent Division Bench decision of Allahabad High Court in

Gulab Devi v. Banwari Lal, reported in A. I. R. 1940 Allahabad 403

read in the light of the original texts

by PT. THAKUR PRASAD DUBEY, M. A., LL. B., P. C. S. (JUDICIAL), Agra.

Hindu law as is well known has a definite code of rules on the branch of law dealing with Hindu females, their conducts in life and their estates. This law will be found scattered in various smritis and in the commentaries of the standard ancient authors. It is well settled that under the statute law of the land the Anglo-Indian Courts are bound to administer the rules of Hindu law to Hindus in cases of this type. Any departure in the actual administration of justice from the correct rules of Hindu law is therefore not permissible. A lawyer or a judge has not to look upon the law as it

stands with the eye of a reformer. They have to expound and to administer the law as it is handed down to them for administration. Notes of this type may be condemned as being conservative in tone or backward in social taste in quarters of social reformists, but a person concerned with the administration of justice has no concern to mind such criticisms or to allow himself to be deflected on that account. Before we come to the precise point under discussion here and before we deal with the legal aspect of the powers of widows and the necessities for which they are entitled to make

alienations, it would be necessary to put down the original texts of Hindu law themselves in their original form for they would afford the best guide by themselves for coming to a proper conclusion.

(a) While young a woman remains under the control of her father, after marriage under the control of her husband and on his death under the control of her sons. She does not deserve complete independence at any time: *Manu* 9. 7. and *Yajnavalka* 8. 4.

(b) The wife, the son and the slave have been declared to be without property; whatever they acquire belongs to the man to whom they belong: *Manu* 8. 416 and *Mahabharat Udyug* 33. 64.

(c) Women being suppressed and discarded are not mistresses of themselves nor of any property: *Shatapatha Brahman* 4. 4. 2—13.

(d) The male is the heir; the female is not the heir: *Maitrayani Samhita* 4. 6. 4.

(e) For women their husbands' immovable property is meant only to be enjoyed; *Viyada Chandra* 22. 1.5.—7.

(f) On the husband's death the wife who guards the purity of the family receives his property as long as she lives but she has no right to give away, mortgage, or sell the property: *Brahaspati* and *Katyayana* quoted in *Smriti Chandrika* p. 677.

Commenting upon this text of *Brahaspati* and *Katyayana*, *Smriti Chandrika* at p. 677 and *Vir Mitra Udaya* at p. 626 and *Vyavahara Mayukha* at p. 138 lay down that these reservations against alienations do not relate to religious gifts. The widow is perfectly entitled to make religious gifts and also to mortgage or sell the property for purposes of making such religious gifts.

(g) On the death of her husband the woman is entitled to food and raiment or in the event of his being an undivided coparcener she receives a portion of the property till her death: *Katyayana* quoted in *Smriti Chandrika* p. 698.

(h) If the husband has been divided from his coparceners his wife shall take on his death all the property in the shape of pledges and other things excepting immovable property: *Brahaspati* 25. 53.

This exception made by *Brahaspati* regarding immovable property being inherited by a widow has been a subject-matter of very acute comments and criticisms at the hands of Hindu law commentators. *Smriti Chandrika* says that this exception refers only to such widows as have no daughters. *Parashar Madhava* says that this exclusion from inheritance of immovable property

means only this much that the widow is not entitled to sell it without the consent of the other coparceners.

The text of *Prajapati* allows a widow to inherit both moveable and immovable property of her husband and this conflict among the *Smritikars* is met by other commentators by laying down that this text of *Brahaspati* refers to widows with no character or to cases where the husband was an undivided coparcener.

(i) A wife though preserving her character is not entitled to inherit immovable property even though the share of her husband may have been separated. They shall give her food or portion of arable land at will: *Brahaspati* 25. 54..

(j) The wife is entitled to inherit her husband's property: *Brahaspati* 25. 55 quoted in *Mitakshra* page 766.

(k) The sonless widow, faithful to her husband's bed and living with her elders shall patiently enjoy her husband's property till her death; after her death the heirs shall receive it: *Katyayan* quoted in *Smriti Chandrika* page 677 and also in a large number of other comments.

(l) The husband's immovable property the widow can only enjoy, she cannot give it away: *Viyada Chandra* 22. 1. 7.

(m) In regard to the immovable property it is said that she shall enjoy it till her death, after which the coparceners shall obtain it: *Vivada-Ratnakara* 511.

(n) The wife's inheritance of the husband's property has been declared to vest in mere enjoyment, women shall in no case dispose of the property of their husbands: *Mahabharata*, *Dana-Dharma* quoted in *Vivad Chintamani* page 233 and in other comments.

(o) Let the childless widow preserve unsullied the bed of her lord and abiding with her venerable protector enjoy with moderation the property till her death. After her, let the heirs take it. But she has no property therein to the extent of gift mortgage or sale: *Katyayana* quoted in *Vivad Chintamani* p. 292 and by other commentators.

(p) For women the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husband's wealth: *Mahabharat* quoted in *Dayabhag* 9. 1. 60.

(q) Women's business transactions are null and void except in case of distress specially the gift, pawning or sale of a house or field. Women are not entitled to make a

gift or sale; a woman can only take a life interest whilst she is living together with the rest of the family. Such transactions of women are valid where the husband has given his consent or in default of the husband the son or in default of the husband and the son the king : Narad 3. 27-30.

(r) A woman is not entitled to inherit, for thus says the Veda, "Females and persons deficient in an organ of sense are deemed incompetent to inherit": Baudhyayana Prasna 2 K. 2.

I have attempted to collect all available relevant texts under Hindu law bearing on this subject. Some of these texts are bound to excite condemnation at the hands of that class of people who believe in and advocate absolute freedom of women and they will denounce this part of Hindu law as an illogical relic of antiquity unsuited to modern conditions of life. It is no purpose of mine here to enter into the defence of this branch of Hindu law in this short note. I however cannot help quoting the late Mr. Priya Nath Sen M. A. D. L., an eminent lawyer and a great Sanskritist who had made a special study of ancient Hindu law and Hindu jurisprudence and who had delivered his Tagore Law Lectures therein in 1909. He discussed this branch of Hindu law and quoted a number of texts showing the position of Hindu woman in Hindu society and after a resume of all those texts he made the following observations at p. 276 of his Tagore Law Lectures :

It is therefore a great mistake to suppose that the declaration of the perpetual dependence of women imports any degradation; it is only meant as a measure for their protection, for they are by nature weak and unable to bear turmoils of the world and stand against its terrors and temptations without guidance and control.

The texts given above constitute practically the whole of the Hindu law on this subject and as faithful administrators of justice it is the duty of the Courts in British India to administer this law alone to the Hindus on that subject. If we carefully read these texts we find an unmistakable tendency in these texts of suppressing and restricting all powers of transfer of widows holding widow's estate. The only power of alienation granted to the widows is in respect of religious gifts and sometimes in cases of distress. They have not been given powers of alienations for any other necessity whatsoever. Thus, it is obvious that on the plain meaning of these texts a widow is

not entitled to make an alienation for any other secular or worldly necessities. The Courts in India and their Lordships of the Privy Council have, however, made extensions in this branch of Hindu law on the question of powers of Hindu widows for making alienations of the estate in cases of necessities of the estate. So far as these extensions are in keeping with the letter and the spirit of these texts nobody has any ground of objection thereto. But extensions and additions engrafted on Hindu law by Courts which are repugnant to, or, are not in keeping with the injunctions of Hindu law laid down in the texts aforesaid, I beg to submit, are not permissible under the statutory law of the land.

It will be necessary at this stage to state that Indian Governments have ever been very jealous in preserving and applying the rules of Hindu law to Hindus. Such was the condition in the time of Muslim rulers as well. Warren Hasting knew that fact and hence in 1772 he promulgated an Ordinance to that effect in clearest terms. Large number of Statutes were passed by Parliament and local Regulations were issued by East India Company on that subject in different parts of the country at different times and thereafter a number of Acts were passed by the Indian Government : *vide* for instance Reg. IV of 1793, S. 3, and Regulation III of 1803, S. 16 : *vide also* for Bengal, Assam and U. P., 21 Geo. III, C 7051, and Act 12 of 1887, S. 37 ; for Oudh, Act 18 of 1876, S. 3 ; for Punjab, Act 4 of 1872, S. 5-7. All these have laid down that in matters of personal status, adoption, marriage, partition, alienations of property, succession and all religious usages and institutions, the law applicable to Hindus is the Hindu law. This is a privilege of inestimable value to Hindus in general and particularly to those of them who have great faith in its intrinsic merits. It is therefore keenly felt in those quarters where they find arbitrary encroachments made upon that law in the administration of justice. We should not be misunderstood as being advocates of narrow conservatism or of permitting Hindu law to stagnate or remain ever static. Hindu law has never remained static. It has ever changed from epoch to epoch and has ever been in process of evolution. That is the unanimous opinion of the greatest scholars on the subject. This is however a digression.

Relying upon the texts of Hindu law permitting the widows to make gifts for religious purposes it has been established by

a long course of decisions since the establishment of the rule of East India Company that a woman has an absolute right to transfer the estate of the last male owner which she holds as the limited owner as his successor for purposes of the performance of the obsequial ceremonies of the last male owner and for discharge of all his debts. She has been empowered to alienate the estate even for the payment of the time-barred debts of the last male owner. The discharge of the debts is an act of liquidating a sin and as such an absolute religious necessity in the eye of the Hindu law. These aforesaid necessities are essential and obligatory under Hindu law and the widow has absolute powers therefor. She can alienate even the whole of the estate for these purposes. This much of the case law is quite in keeping with the rules incorporated in the texts of Hindu law: *vide* A I R 1930 Cal 351,¹ 22 Bom 818,² 11 Mad 288,³ 36 Cal 753,⁴ A I R 1922 P C 261.⁵ The next class of cases decided so far have laid down that she is entitled to make alienations or incur debts to bind the estate for such other religious performances as are considered meritorious in the eye of Hindu law as conferring benefits on the soul of the deceased. Such religious acts are not acts of absolute necessities but are in the nature of spiritual luxuries as described by Mr. Mayne at page 879 of his Hindu Law and Usage. A widow has been empowered to alienate a small portion of the estate for such purposes. The cases that have laid down these rules are also quite within the letter and spirit of the Hindu law: *vide* 6 Cal 36,⁶ 7 W R 146,⁷ 8 M I A 529⁸ at p. 551, 13 M I A 209,⁹ A I R 1922 P C 261,⁵ A I R 1918 ALL 40,¹⁰ 34 Mad 288,¹¹

1. ('30) 17 AIR 1930 Cal 851: 126 I C 263: 57 Cal 904: 34 C W N 153, Ashutosh Sikdar v. Ohidam Mandal.
2. ('98) 22 Bom 818, Ratan Chand v. Javher Chand.
3. ('88) 11 Mad 288, Lakshmi Narayana v. Dasu.
4. ('09) 36 Cal 753: 2 I C 152, Sri Mohan Jha v. Brij Behary Misser.
5. ('22) 9 AIR 1922 P C 261: 69 I C 36: 44 All 503: 49 I A 383 (P C), Sardar Singh v. Kunj Behari Lal.
6. ('81) 6 Cal 36: 6 C L R 429, Ram Coomar Mitter v. Ichamoyi Dasi.
7. ('67) 7 W R 146, Raj Chunder Deb v. Sheeshooram Deb.
8. ('65) 8 M I A 529: 2 W R 61: 1 Sar 820: 1 Suther 476 (P O), Collector of Masulipatam v. Cavely Vencata Narrainapah.
9. ('69) 13 M I A 209: 3 Beng L R 57: 12 W R 47 (P O), Raj Lakhi Debia v. Gokul Chandra.
10. ('18)-5 AIR 1918 All 40: 48 I O 847: 41 All 180: 16 A L J 996, Kunj Behari Lal v. Laltu Singh.
11. ('11) 34 Mad 288: 6 I O 240: 20 M L J 798: (1910) M W N 222: 8 M L T 74, Vappuluri v. Garinalla.

A I R 1916 Cal 792,¹² A I R 1934 Mad 432,¹³ 44 ALL 503,⁵ A I R 1924 ALL 902,¹⁴ 36 Bom 88,¹⁵ 13 C W N 544,¹⁶ A I R 1931 Pat 330.¹⁷ It has also been laid down that the widow can incur debts for the performances of religious ceremonies of persons whose ceremonies the deceased owner was bound to perform, for example the shradh of his mother and the like. This is also not against the text of Hindu law. Next come the class of cases dealing with secular necessities on which subject there has been and is bound to be sharp divergence of judicial opinion. As the original texts stand there is no power vesting in a female holder of a limited estate for making alienations for any of our so-called modern secular necessities.

There is only one text which is of Narad quoted above wherein it is laid down that a widow can alienate in cases of distress. Now this is the only text of Hindu law that empowers a widow to transfer the estate for a secular necessity and that necessity is one of "distress." Thus on the texts as they stand she can only alienate to avert a distress or calamity and for no other purposes. To my mind to hold that a widow can alienate for necessities other than calamities is an open violation of Hindu law. But the Indian Courts and their Lordships of the Privy Council have laid down in a series of cases that a widow can alienate for secular necessities other than those of distresses and in so doing their Lordships have to that extent in a way transgressed the rules of Hindu law and it is difficult to reconcile some of them with that law and with the law that lays down that Hindu law alone should be applied to Hindus in such matters. I have another very important authority in support of my proposition. That is the Vyavastha of the learned Hindu Pandits called Shastris given to Courts on their questionnaires. This particular Vyavastha will be found at p. 374-75 of the Digest of Hindu Law by West and Buhler (Edn. 4). The question demanded an exposition on the point of the nature of

12. ('16) 3 AIR 1916 Cal 792: 31 I O 439: 43 Cal 574: 22 O L J 345, Khublal v. Ajodhya Misser.
13. ('34) 21 AIR 1934 Mad 432: 155 I O 79: 57 Mad 772: 67 M L J 204, Venkata Subba Rao v. Ananda Rao.
14. ('24) 11 AIR 1924 All 902: 80 I O 31: 46 All 822: 22 A L J 753, Darbari Lal v. Gobind Saran.
15. ('12) 36 Bom 88: 12 I O 271: 13 Bom L R 860, Ganpat Dhaku v. Tulsiram.
16. ('09) 13 O W N 544: 1 I O 434: 9 O L J 453, Hari Kissen v. Bajrang Sahai.
17. ('81) 18 AIR 1931 Pat 830: 134 I O 137: 10 Pat 474: 18 P L T 108, Ram Surat Mahton v. Hitanandan Jha.

rights of a widow in the property inherited by her. The Vyavasth says "The widow cannot dispose of her immovable property unless she be placed under great distress."

That exposition was made on a survey of all relevant texts of Hindu law by Pandits trained and well versed in Hindu law.

(To be continued.)

REVIEWS

Bihar Digest (Civil, Criminal and Revenue, 1934-1940), Published by BIHAR REPORTS, *Inside Taxali Gate, Lahore*. 866 columns. Price Rs. 7.

This is a first digest for the Province of Bihar giving only the cases decided by the local High Court, the Federal Court and the Privy Council. The practitioners in the mofussil would be relieved of great troubles in searching the case law of all the High Courts as this book would give them the necessary material for their purpose. The cases have been digested under appropriate headings. Parallel references have been given. Printing and general get-up of the book are decent and the price is comparatively moderate.

The U. P. Local Acts (Annotated), Vols. 2 and 3 (Third Edition), by MOHAN LAL KHARBANDA, B. A. (HONS.), LL. B., *Editor, Allahabad Weekly Reporter*. The book can be had from the Allahabad Weekly Office, Indian Law House, Allahabad (U. P.). Pages 2015. Price for all three volumes Rs. 18.

The author in these volumes 2 and 3 has completed all the Acts from H to Z with amendments upto end of June 1940. Short notes with reference to case law have also been given at places to facilitate the lawyers. Important rules and notifications have also been given wherever necessary. The set of these three volumes will be very useful to the U. P. lawyers.

The U.P. Municipalities Act, by MOHAN LAL KHARBANDA, B. A. (HONS.), LL. B., *Editor, Allahabad Weekly Reporter*. The book can be had from the Allahabad Weekly Reporter Office, Indian Law House, Allahabad. Pages 226. Price Rs. 4.

The author in this book has included all amendments (Local and Imperial) up-to-date. The case law upto August 1940 has been digested at proper places. Important rules under the Act have also been given for the use of the readers. The price is not very high looking to the useful material supplied.

The Indian Stamp Act (Annotated), by MOHAN LAL KHARBANDA, B.A. (HONS.), LL. B., *Editor, Allahabad Weekly Reporter*. The book can be had from the Allahabad Weekly Reporter Office, Indian Law House, Allahabad. Pages 80. Price Rs. 3.

Since the Stamp Act has been amended by the various Provincial Legislatures a book with up-to-date local amendments is always in demand by the legal practitioners. The author has included all such amendments in this small book. The notes at the foot of the different sections would be of much use to the legal practitioners for ready reference.

Oudh Taluqdari Acts (Annotated), Indian Police Act (Annotated), Public Gambling Act (Annotated) and U. P. Prevention of Adulteration Act (Annotated), by MOHAN LAL KHARBANDA, B.A. (HONS.), LL.B., *Editor, Allahabad Weekly Reporter*. The books can be had from the Allahabad Weekly Reporter Office, Indian Law House, Allahabad. Price Re. 1 each.

These four books of one rupee series have been brought up-to-date by including amendments both Local and Imperial. These books though small would be much useful as the author has given short notes with reference to case law at the foot of each section. The legislative changes have also been shown. The price would not be high considering the utility of the books to the lawyers.

The Indian Partnership Act (2nd Edition), by ANUKUL CHANDRA MOITRA, M.A., B.L., *Calcutta*. Revised by K. C. Chunder, B.A. (Cal. & Oxon.) I.C.S., Barrister-at-Law. Published by R. N. Sanyal, M.A., B.L., of Sanyal & Co., Law Publishers, 1/1A, College Square, Calcutta. Pages 335. Price Rs. 3/12.

In this edition, the author has rewritten and recast the text generally and has brought it up-to-date. The notes to the sections are critical and exhaustive. The principles have been lucidly stated with reference to decided cases reported both in official and private journals. The rules framed by the several Provincial Governments have been carefully given in the Appendices. The inclusion of Model deeds, suggested forms of notices, reports of Special and Select Committees, the English Partnership Act, repealed sections of the Indian Contract Act with comparative table, etc., makes the book very exhaustive. The printing and get up are good and the price is moderate.

Some observations on the Hindu Law of Widow's Estate
as enunciated by the recent Division Bench decision of Allahabad High Court in
Gulab Devi v. Banwari Lal, reported in *A. I. R. 1940 Allahabad 403*
read in the light of the original texts

by PT. THAKUR PRASAD DUBEY, M.A., LL.B., P.C.S. (JUDICIAL), Agra.
(Continued from page 8 : see January issue)

Their Lordships of the Privy Council have however laid down that the power of a widow or other limited heir to alienate the estate inherited by her for purposes other than religious or charitable is analogous to those of a manager of an infant's estate as defined by the Judicial Committee in *Hanooman Persaud Pandey v. Mt. Boboee Mundraj Koonweree*:¹⁸ vide 6 Cal 843.¹⁹ This proposition laid down by their Lordships of the Privy Council in the aforesaid cases is well summed up in the following sentence in that case. "The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it in the particular instance is the thing to be regarded." So far also no serious objection can be taken by modern lawyers and nobody can deny that the widow does hold the estate as stated above in the texts only for her life and that she is bound to hand over the same undestroyed to the reversioners of the last male owner at the time of her death. She has therefore to manage the estate efficiently and to preserve it. If there is a danger to the estate or if there is an actual pressure of a necessity on the estate that can only be averted by an expenditure from the estate, then if she alienates for such necessities, such alienations are not against the spirit of the texts of Hindu law. Whether she can alienate the estate for such purposes as are called "benefits to the estate" is a matter of high controversy and can hardly be said to be settled even on the basis of the case law. My reading of the Hindu law is that she has no such powers under the texts of Hindu law.

The cases of managers of undivided Mitakshara coparcenaries and even of managers of infants' estate are entirely different from those of Hindu widows holding widow's estate. For the powers of alienation of managers of coparcenaries, the Courts are bound to base their decisions on the texts pertaining to that branch and we have the Brihaspati's text laying down that even a single coparcener can alienate "during a season of distress for the sake of the family

and specially for pious purposes"; the gloss of Mitakshara therein is "a calamity affecting the whole family render it necessary or the support of the family demand it." Such are not the behests of Hindu law in any of the texts for Hindu widows. By no stretch of logic can we apply the aforesaid Brihaspati's rule or Mitakshara gloss to the case of a widow. The case of a manager of an infant's estate is one of a trustee pure and simple. A trustee can in the efficient discharge of his duties for the best interests of the infant, alienate for augmenting the estate. A widow's position however as deducible from the aforesaid texts is not of a trustee. Mayne says at p. 871 "A woman is in no sense a trustee for those who may come after her." It is only by a far-fetched analogy and by way of an illustration that the widows are taken to look like trustees. Hence the application of the rule of *Hanooman Persaud's case*¹⁸ to the case of a widow as allowed by their Lordships of the Privy Council in the aforesaid case of *Kamessur Prasad*¹⁹ is against the texts and the spirit of Hindu law. A widow can, correctly speaking, alienate only in cases of distress as given in the text of Narad and as expounded in the Vyavastha aforesaid.

Coming again to decisions, we find that under this heading of secular necessities it has been held that widows are entitled to incur debts for taking out probates or letters of administration for the estate of the deceased owner, and also for payment of Government revenue for the protection of the estate: vide *A I R 1915 Cal 141*,²⁰ *A I R 1926 P O 56*,²¹ *36 Cal 753*,²² *A I R 1929 Oudh 422*.²³ It has also been held that she has also powers to incur debts for maintaining herself out of the estate and of persons whom the deceased owner was bound to maintain: vide *5 Bom 450*²³ at p. 460, *46 ALL 822*¹⁴ and *57 Mad 772*.¹³ Such necessities are also necessities which a woman holding

20. ('15) 2 *A I R 1915 Cal 141*: 25 *I O 84*: 20 *O L J* 23: 19 *O W N 313*, *Rameshwar Mandal v. Provatibati Debi*.

21. ('26) 13 *A I R 1926 P O 56*: 95 *I O 839*: 5 *Pat* 585: 53 *I A 134 (P O)*, *Ganesh Lal Pandit v. Khetra Mohan*.

22. ('29) 16 *A I R 1929 Oudh 422*: 114 *I O 788*: 4 *Luck 279*: 5 *O W N 1097*, *Jagannath Singh v. Gurcharan Singh*.

23. ('81) 5 *Bom 450*, *Sadashiv Bhasker v. Bhakubai*

18. ('72) 6 *M I A 393*: 18 *W R 81*: 2 *Suther 29*: 1 *Sar 552 (P C)*.

19. ('81) 6 *Cal 843*: 8 *I A 8*: 8 *O L R 361*: 4 *Sar 210 (P C)*, *Kamessur Pershad v. Run Bahadur*.

the estate for the reversioners can legitimately meet by encumbering the estate or by alienating portions of the same for such necessities can be said to be cases of "distress". Another class of cases is those where it has been laid down that a female holder of the estate can incur debts binding on the estate for the expenses of the marriages of such relations of the deceased owner which the latter was bound to perform and which are a burden on the estate. Such relations are the daughter, son's daughter, and the like. It has been laid down in these cases that the last male owner is bound to perform the marriages of these people and hence the female holder has to discharge that burden: *vide* 6 Cal 36,⁶ 31 Cal 433,²⁴ 33 ALL 255,²⁵ 36 Bom 88,¹⁵ 45 ALL 297,²⁶ 1 Luck 477²⁷ and A I R 1926 Pat 1.²⁸ So far also there can be no serious objection on this extension of Hindu law, though it is an extension to the rules of Hindu law but not repugnant to them. The case of the Allahabad High Court is one where a Hindu widow has alienated her husband's estate for the expenses of the bhat ceremony of the daughter of the sister of her husband. The question is can such a necessity be deemed to be one sanctioned by the Hindu law or even by the cases so far decided making extensions to the rules of Hindu law as aforesaid. In this connection let me quote some of the important modern commentators on Hindu law. Mayne in his Hindu Law and Usage (Edn. 8) observes :

She may also alienate the property in order to defray the expenses of ceremonies of other members of the family such as her husband's mother, provided they were ceremonies which he was bound to perform in his lifetime and in the benefits of which he would participate : (p. 879.)

As a female heir is bound to maintain and perform marriages and other ceremonies of those who are a burden on the estate, so she may mortgage or sell the property to procure the necessary funds : (page 881).

Dr. Gour in his Hindu Code has laid down a summary of the rules deducible from the decisions of the cases at p. 1018 of his Hindu Code and in clause 11 therein he lays down that a widow can make alienations for the

expenses of the marriages of female relations of the last full owner whom he was bound to marry, such as his sister, daughter, son's and grandson's daughters and the like. There is a definite case of Patna High Court reported in A I R 1916 Pat 178²⁹ which lays down that a widow inheriting to her husband is not entitled to defray the marriage expenses of her daughters' daughters. The facts of the Allahabad case referred to above in the heading of this note are very simple. Nihal Singh was the last male owner of the property in question and on his death his widow Mt. Mansa succeeded to his estate as a Hindu widow with a limited estate governed by the Mitakshara School of Hindu law. On her death Nihal Singh's estate devolved on his sister Mt. Gulab Devi who had a daughter Mt. Bishen Dei. During her lifetime Mt. Mansa executed a simple mortgage deed in favour of defendant 4 in respect of a portion of the estate and borrowed Rs. 250 for defraying expenses of the "bhat" ceremony in the marriage of her husband's sister's daughter, Mt. Bishen Dei. The suit was brought by Mt. Gulab Dei for avoidance of that mortgage deed on the ground that her brother's widow Mt. Mansa Devi had no powers to make such a mortgage and that that mortgage was without any justifying necessity and as such not binding on her brother's estate. Their Lordships (Thom C. J. and Ganga Nath J.) held that the debts of the mortgage deed in suit were binding on his estate as they did constitute justifying cause for a Hindu widow for making an alienation.

Thus, in the case before us, we have a hard fact that Mt. Mansa inherited to her husband Nihal Singh and she could not incur debts for defraying the expenses of the marriage of her husband's sister's daughter, Mt. Bishen Dei. That is a clear finding accepted by the Hon'ble Judges in that case. Their Lordships have sanctioned the validity of that debt on the simple ground that the debt in question did constitute a legal necessity entitling the widow to mortgage the husband's estate. Their Lordships cited the dictum of their Lordships of the Privy Council in the famous case in 1 Pat 741³⁰ to the effect that necessity does not mean actual compulsion but the kind of pressure which the law recog-

24. ('04) 31 Cal 433 : 8 C W N 408, Debi Dayal v. Bhan Pertap Singh.

25. ('11) 33 All 255: 9 I C 199: 8 A L J 13, Makhanlal v. Gayan Singh.

26. ('24) 11 A I R 1924 All 23: 73 I C 648 : 45 All 297 : 21 A L J 232, Bhagwati Shukul v. Ramjatan Tewari.

27. ('26) 13 A I R 1926 Oudh 425 : 95 I C 574 : 1 Luck 477 : 3 O W N 529, Madho Prasad v. Dhanraj Kumar.

28. ('26) 13 A I R 1926 Pat 1 : 90 I C 732 : 5 Pat 350: 6 P L T 731, Baijnath Rai v. Mangla Prasad.

29. ('16) 3 AIR 1916 Pat 178 : 34 I C 277 : 1 Pat L J 81, Narain Bati Kunware v. Ramdhari Singh.

30. ('22) 9 A I R 1922 P C 356 : 69 I C 71 : 49 I A 342: 1 Pat 741 (P O), Ram Sumran Prasad v. Shiam Kunwari.

nises as serious and sufficient. The finding of fact and law given by the lower appellate Court was that Mt. Mansa, the widow, was under no obligation to perform the marriage of Mt. Bishen Dei. That finding was accepted by their Lordships in appeal. The additional opinion of the lower appellate Court was that under the ordinary usage and custom prevalent among the Hindus the widow was under an obligation to send in that marriage customary presents usually called "bhat". On this finding of fact, and on the further consideration that if a person failed to send this present in the marriage ceremony he would fall in the estimation of his caste fellows, their Lordships held that the debt in question was binding on the estate and did constitute the legal necessity under the Hindu law. The point is whether this extension made by their Lordships to the original rules of Hindu law is in keeping with their spirit and letter.

As I have said above, pure and simple Hindu law does not allow any alienation by a Hindu widow of her husband's estate except for religious purposes or in cases of distress. So far as the text of Hindu law goes it is impossible to hold that a widow is authorized to mortgage the husband's estate for making such presents in marriages of such of the husband's relations as the husband himself was not under any obligation to perform. Thus this decision of their Lordships is not reconcilable with the texts of Hindu law. Further more, this decision introduces a new sanctionable necessity not covered by any of the decisions so far made on this subject. So far as such extensions and additions as are in keeping with the spirit of the Hindu law texts go, there can be no cause of grievance. The grounds of objections which can be validly taken against such extensions are those where they are in contravention of or a violation of the original rules of Hindu law. As will appear from the texts aforesaid the earlier Hindu law-givers did not even permit widows to inherit immovable estates of their husbands. In course of time however, the successive law-givers step by step allowed a certain greater amount of liberality in favour of the widows in inheriting their widow's estate and immovable property was permitted to be inherited by them but the rules of Hindu law even of very later times did not allow powers of alienations in favour of widows. The object of the Hindu law-givers

appears to have been the preservation of the family estate unimpaired in the hands of Hindu widows. The following remarks of Dr. Buhler and West made at p. 262 of their Hindu Law Digest (Edn. 4) are pertinent on this occasion :

So jealous was the Brahminical law of any impairment of the family estate, the wife being along with the son and the slave in this ancient constitution of Hindu society, nirdhan or without capacity for property and her competence in that respect having been extended by steps which seem to have always been jealously watched and restricted.

We have to bear in mind that this restriction on the right of women against their holding absolute properties is not only peculiar to Hindus alone. As has been observed by those learned authors the same has been the law among the Romans and is the law in China. They have further observed :

Women were regarded by Teutonic laws as necessarily dependent and traces of this order of ideas still remain in the English law. The proper guardian was the husband, father, brother or son, the nearest agnate or the King's Court.

We have therefore not to be in any way uncharitable to or to be doubtful of the wisdom of our ancient Rishis for this part of their legislation. Confining ourselves to the strict legal position even on the basis of the Privy Council decisions so far made, I think the secular necessities for which a Hindu widow has ever been allowed to alienate or encumber her husband's estate has ever been the necessities of the estate and not the personal necessities of the widow beyond the necessity of her maintenance. She holds the estate not as her own property; she holds it only for the cause of her husband and as a sort of trustee for his presumptive heirs. This is the rule deducible from the aforesaid texts and from the authorities of the Judicial Committee. Judged in this light, the decisions that have made and make exotic engraftations to the ancient rules of Hindu law may, I beg to submit, prove a further inroad on the actual rules of Hindu law and may pave a way for a further source of future extensions that may in their cumulative effects cause a disfigurement of that harmonious picture painted with the experience and traditions of centuries by our ancient Rishis whose broad sympathies for humanity as a whole and whose learnings, piety and renunciation of all worldly gains were their only asset, and may result in a substantial mutilation or even partial annihilation of that ancient law which the Hindus hold so dear.

by NIRMAL C. SEN, M. A., B. Sc., B. L., *Advocate, Calcutta.*

Hindu law is customary law as distinguished from statutory law. The various dissenting sects within Hinduism are entitled to follow their special customs and rites in so far as these are not contrary to the general law or offensive to the canons of morality or against public policy. Perhaps contact with other religions has evolved these sects which have discarded many characteristics of orthodox Hinduism and adopted ideas and rites popularly supposed to belong to other systems, but continuity with a religion which is so elastic in its scope as is Hinduism need not necessarily be taken to have been destroyed. If a man is born a Hindu, deviation from orthodoxy not amounting to a clear renunciation of his religion does not deprive him of his status as a Hindu. The criteria for loss of the status as a Hindu are either separation from the Hindu communion or a clear renunciation of the Hindu religion: *see the cases in 30 I A 249¹ and 48 I A 553.²* Neither can be established except by a Hindu becoming a Mahomedan or a Christian or by the combined operation of migration, inter-marriage and new modes of life. Even a solemn declaration under the Special Marriage Act, 1872 (Act III of 1872), by a person that he does not profess the Hindu religion is insufficient to deprive him of his status as a Hindu: *see the cases in A I R 1923 Cal 265³ and A I R 1928 Bom 74.⁴* The term "Hindu" applies to persons who are Hindus either by birth or by religion, provided that those who are born Hindus have not become converts to Christianity or Mahomedanism. A person need not be a Hindu in the strict theological sense. Thus, persons converted to Hinduism are also Hindus; membership of a caste is not a necessary pre-requisite for being a Hindu: *see Mayne's treatise on Hindu Law and Usage, Edn. 10, 1938 pp. 90-91.*

Hindu law as the personal law of the Hindus governs every Hindu either by birth or by religion so long as he enjoys the status as a Hindu or is not deprived of the personal law by statute: *see the Special Marriage Act, 1872.* A Hindu, however, on his conversion to

Christianity or Mahomedanism, ceases to be governed by his prior personal law because of a conflict of laws: *see the cases in A I R 1922 P C 14⁵ and 10 M I A 511.⁶* In the absence of any such conflict, the personal law must continue to apply to him even though he is not a Hindu in the strict theological sense. Again, conversion to Hindu religion of persons of non-Hindu origin attracts with it the application of Hindu law: *see the cases in 52 Mad 160,⁷ A I R 1937 Mad 172⁸ and 33 Mad 342.⁹*

The Brahmos are undoubtedly a dissenting sect of the Hindus for the purpose of the application of Hindu law. In 30 I A 249,¹ the Judicial Committee has held that a Hindu does not cease to be a Hindu by becoming a member of the Brahmo Samaj or by lapses from orthodoxy so long as he does not become separated from the religious communion in which he was born. In the cases in A I R 1923 Cal 265³ and A I R 1928 Bom 74,⁴ it has been held to the effect that a declaration under sch. 2, Special Marriage Act, 1872, is effective only for the purposes of that Act, and does not involve a renunciation of the Hindu faith. Thus, in the case of the Brahmos, there has been neither a separation from the Hindu communion nor a clear renunciation of the Hindu religion. They form an influential community, and do not recognise idolatry, polygamy or caste-distinction. Their ideas of worship, monogamy, inter-marriage and conversion are not strange to the Hindus: *see (1) the Anand Marriage Act, 1909 (Act 7 of 1909), and (2) the Madras Nambudri Act (Act 21 of 1933), and (3) the Madras Marumakkathayam Act (Act 22 of 1933) and (4) the Arya Marriage Validation Act, 1937 (Act 19 of 1937).* The Brahmos observe a special marriage ceremony between persons who have joined their sect. The customary ritualistic marriage of the Brahmos appears to be perfectly valid and legal in view of the fact that the shastric ceremonies have been almost entirely superseded by those which custom and convenience have substituted in their place, and

1. ('03) 31 Cal 11: 30 I A 249: 84 P R 1903: 7 C W N 895 (P C), *Rani Bhagwan Kuar v. J. C. Bose.*

2. ('22) 9 A I R 1922 P C 197: 66 I C 609: 49 Cal 310: 48 I A 553: 11 L B R 155 (P C), *Ma Yait v. Maung Chit Maung.*

3. ('28) 10 A I R 1923 Cal 265: 70 I C 463: 49 Cal 1069: 26 C W N 799, *In the goods of Jnanendranath Ray.*

4. ('28) 15 A I R 1928 Bom 74: 108 I C 492: 30 Bom L R 139, *Vidyagavri v. Narandas.*

5. ('22) 9 A I R 1922 P C 14: 64 I C 559: 43 All 525: 48 I A 381 (P C), *Kamawati v. Digbijay Singh.*

6. ('64-66) 10 M I A 511: 2 Sar 189 (P C), *Jowala Buksh v. Dharum Singh.*

7. ('28) 15 A I R 1928 Mad 1279: 111 I C 364: 52 Mad 160: 55 M L J 478, *Ratansi D. Morarji v. Administrator-General of Madras.*

8. ('37) 24 A I R 1937 Mad 172: 167 I C 488, *Ramayya v. J. Elizabeth.*

9. ('09) 33 Mad 342: 5 I C 42: 20 M L J 49: 7 M L T 17, *Muthusami v. Masilamani.*

Lecture on some aspects of early Hindu law

by T. J. KEDAR, B.A., LL.B., M.L.A., Vice-Chancellor, Nagpur University.

The law of the Hindu was at first a Code of religious injunctions. The Hindu religion was in the beginning a sacrificial religion. The rituals and ceremonies have been very minutely described in the Vedas, the Brahmanas and Smritis. These necessitated the formulation of certain moral injunctions also. It was after a long time that the positive law was evolved for governing and regulating the secular and semi-religious relations between man and man or between man and society. In fact, according to the Mahabharata, its evolution took place when society became clothed with a political status. This is said to have happened in the Krita-yuga. According to the data available in the ancient books of the Hindus, the Kritayuga must be deemed to have ended at least 5000 years before the 12th century B. C., when according to a learned astronomer, Mr. K. L. Daftari, the Kaliyuga is supposed to have begun : *vide*

चत्वारि तु सहस्राणि वर्षाणां कुरुनन्दन ।
आनुस्संख्या कृतयुगे संख्याता राजसत्तम ॥
तथा त्रीणि सहस्राणि त्रेतायां मनुजाधिप ।
द्वे सहस्रे द्वापरे तु भुवि तिष्ठन्ति सांप्रतम् ॥

(Mahabharata; Bhishmaparvan,
Chap. 10, verses 5 and 6.)

"The duration of Kritayuga is 4000 years. That of Tretayuga and Dwapara is 3000 and 2000 years respectively." After the discoveries of Mahenjo-Daro and Harappa, there should not be now any hesitation in accepting this antiquity.

The Mahabharata describes the process of the evolution of positive law in this way:

नियतस्त्वं नरव्याघ्र शृणु सर्वमशेषतः ।
यथा राज्यं समुत्पन्नमादौ कृतयुगेऽभवत् ।
न वै राज्यं न राजाऽसीत् न च दण्डो न दण्डिकः ।
धर्मेणैव प्रजास्सर्वा रक्षन्तिस्म परस्परम् ॥
पाल्यमानास्तथान्योन्यं नरा धर्मेण भारते ।
खेदं परमुपाजग्मुस्ततस्तान्मोहमाविशत् ॥

This shows that there was no kingdom or king in the beginning. The society preserved itself by rules dependent on mutual goodwill and courtesy. But there came a time when people succumbed to temptations and the social order was disturbed.

It appears to me that this was the time when the conception of individual or family ownership of property came into existence. An important clue of this is furnished by another passage in the Mahabharata which describes the peculiar features of the Yadava

confederacy. The Yadavas consisted of 18,000 families but all their wealth was the property of the whole confederacy. No one family could lay individual claim to any portion of it. It was after the defeat of the Yadavas by Jarasandha, that the Yadava families divided the common property and migrated to the west coast of India and founded the city of Dwaraka. It seems clear that when the whole clan or tribe owns property, and there is no leader or chieftain, there was no need of positive law. But when the members of society succumbed to temptations primarily because individual or family ownership of property came into existence, the need for appointing a chieftain to govern and regulate the regulations between family and family or man and man became manifest. The Mahabharata describes the process in the characteristic mythological style.

When at the end of the Kritayuga, the social order was disturbed owing to the cupidity of people, the gods approached the great god Brahma for discovering a remedy. The latter was unable to find one and suggested the performance of sacrifice (यज्ञ). There being no competent person to officiate as a priest, Brahma conceived a priest in his head. The period of gestation was a thousand years, at the end of which the foetus dropped down. To use the popular language, Brahma required a thousand years to put his idea in actual working order. The result of this idea was the appointment of a priest, who officiated at the sacrifice. Owing to this enormous delay, the already shattered social order got degenerated into anarchy and chaos with the result that Brahma appealed to Mahadeo to restore the social order. Mahadeo formed *danda* (दण्ड) out of his soul and started creating kings for enforcing the *danda*.

The story from the Mahabharata shows us how this evolution of positive law which is the same thing as *danda* was contemporaneous with the creation of a king. The Hindus believe that positive law has a divine origin, but it must not be forgotten that the enforcement of positive law was entirely in the hands of king. Law did not emanate as a command from a political being or body, but its enforcement depended on the existence of a king. It is noteworthy that law itself came into existence simultaneously with the creation of a king or in other words

when society was clothed with a political status. Viewed from this standpoint, the theory of Hindu law does not seem to be far removed from the Austinian theory.

Danda or positive law has been described to be inherent in a king (नरेन्द्रस्यो दण्डः). In another passage in the Mahabharata it has been termed as the sole aspect of a kingdom (राज्यस्य दण्डमेवांगम्). The Mahabharata sums up its observations in this stanza (Chap. 122 verse 51 of Shantiparva):

इत्येव दण्डो विख्यात आदौ मध्ये तथावरे ।

भूमिपालो यथान्यायं वर्तमानेन धर्मवित् ॥

Positive law has thus been known in the beginning, middle and the end in order that the king may with justice guide himself properly after fully knowing it.

Another term has been used in the Mahabharata in the discussion of this subject and it is the word *Vyavahara* (व्यवहार), which means administration of justice. The author of the Mahabharata, which by the way must have been composed according to the scholars by 1194 B. C., uses in several places the word *danda* (दण्ड) as a synonym for *Vyavahara* (व्यवहार) and vice versa: *vide*

शृणु कौरव्य यो दण्डो व्यवहारो यथा च सः ।

यस्मिन्हि सर्वमायत्तं स दण्ड इह केवलः ।

धर्मसंख्या महाराज व्यवहार इतीष्यते ॥

Listen oh, scion of the Kurus! *Danda* is the same thing as *Vyavahara*. *Danda* is that on which everything depends. *Vyavahara* is said to be the outward expression of law (Mahabharata: *Shantiparva*, Chap. 121, verse 8-9).

At some places, the distinction is very well kept up :

भर्तृप्रत्यय उत्पन्ना व्यवहारस्तथाऽपरः ।

तस्माद्यः सहिता दृष्टा भर्तृप्रत्ययलक्षणः ॥

— Mahabharat, *Shantiparva*, Chap. 121, V. 50.

There is another branch of law which is named as *vyavahara* which springs out of disputes between two parties. This *vyavahara* which has its origin in disputes is also seen along with *danda*.

The word भर्तृ has a technical meaning. The commentator of the Mahabharata explains it thus :

भर्तारौ द्वौ विवदमानौ प्रत्ययः कारणम् यस्य स तथा वादिप्रतिवादिभ्यां प्रवर्तितो व्यवहारः ।

"*Vyavahara* is that which flows out of the disputes between plaintiff and defendant or complainant and accused." The ancient Hindus believed that justice also had a divine origin :

व्यवहारस्तु वेदात्मा वेदप्रत्यय उच्यते ।

मौलश्च नरशार्दूल शास्त्रोक्तश्च तथापरः ॥

— Mahabharat, *Shantiparva*, Chap. 121, V. 51.

Vyavahara has the Vedas for its soul, its authority is derived from the Vedas; also from family or tribal customs as well as from the shastras.

Having pointed out to you that the origin of the positive Hindu law and justice was according to the beliefs of the ancient Hindus, I turn to other aspects. But before I do it, I would bring to your notice a peculiar habit of the Hindu mind by which abstract conceptions were given a representation in the form of a human being or a beast or a combination of both. The Hindus described the positive law by a representation of half man and half beast :

नीलोत्पलदलशामश्चतुर्दंष्ट्रश्चतुर्भुजः

अष्टपात्रैकनयनः शंकुकर्णोर्ध्वरोमवान् ।

जंटी द्विजिह्वस्ताम्रास्यो मृगराजतनुच्छदः

एतद्रूपं विभक्त्युग्रं दण्डो नित्यं दुराधरः

— Mahabharat, *ibid*, Chap. 121, V. 15-16.

The positive law is blue like the leaf of a blue lotus; it has four tusks, four arms, eight feet, many eyes, pointed ears, hair standing erect. Its head is covered with matted locks and it has two tongues which protrude from the mouth which is red like copper. Its body is covered with the skin of a lion. This is the eternal, fierce and irresistible appearance of law.

Each description is symbolic of an attribute of the positive law. The blue colour indicates the preservation of society. The colour of Vishnu, the preserver, is blue. The tusks are associated with the idea of the divine boar who saved the earth from the deluge and the number suggests the four Vedas on which the fabric of the Aryan society depended. The matted locks indicate the divine origin from Mahadeo who has on his head matted locks. The eight feet suggest according to Nilkantha, the commentator of the Mahabharata, the eight topics of litigation which are : (1) Complaint, (2) a Written Statement, (3) Admissions, (4) Denials, (5) Repayments, (6) Res judicata (प्राज्ञन्याय), (7) Payment in Court and satisfaction and (8) Proof. The Hindus believed that a beast called Sharabha possesses eight feet and is more powerful than a lion or a tiger. An image of Sharabheshwar has been discovered in Southern India and if a painter has to draw on paper the representation as conceived by the ancient Aryans, the image of Sharabheshwar, half man and half beast, can be a good model. I think I must leave the matter there. It is possible that the palace of Justice was in ancient times adorned with this symbolic representation, but no archaeological discovery has established this point.

Ownership of property (either individual or family ownership) naturally brought to the minds of the ancient Hindus the idea of its preservation. I think the transition

was from tribal ownership to family ownership in the first instance. Joint family, the manager or karta of the joint family, the powers of the other coparceners, partition, are some of the most important topics of the present day Hindu law. They revolve round the central conception of joint Hindu family. The property was to be continued in the family, irrespective of the deaths of old members or births of new members. It was for this reason that women were excluded from inheritance and were not sharers as you find in the Islamic system. Sometimes strangers were admitted into the family and were given preferential rights by the manager, to the exclusion of the members of the family. The story of Sunahshepa mentioned in the Aitareya Brahman which is believed to have been composed not later than 1400 B. C., and not earlier than 2400 B. C., is an instance in point. Sunahshepa was a *swayamdatta* son of Vishvamitra who had already hundred sons. When Vishvamitra asked Sunahshepa to become his son, the latter said, "Tell me how, I, an Angiras, can enter your family as a son?" Vishvamitra replied :

Thou shalt be the first born of my sons and thy children, the best. Thou shalt now enter on the possession of my divine heritage. I solemnly install thee in it.

When Sunahshepa raised an objection that Vishvamitra had already one hundred sons and asked what would happen to them, the latter called his sons and told them that Sunahshepa was thenceforth to have the right of primogeniture. Now, out of the hundred sons, fifty were older ones and fifty were younger ones. The former did not agree and Vishvamitra disinherited them by a curse. The younger fifty sons accepted the command of the father and Vishvamitra then pronounced his decree.

एष वै कुशिका वीरो देवरातस्तं अन्विता ।

युष्मांश्च दायं म उपेता विद्यां यामु च विद्मसि ॥

— *Aitareya Brahman, Chap. 7, Sub-chap. 18.*

This Devarata is your master. Follow him Kaushikas. He will exercise the paternal rights over you as his heritage from me and take possession of the sacred knowledge that we have.

This story shows that the head of the family was all-in-all. There were no restrictions on his powers. It is mentioned in the story that the heritage was ancestral and yet the sons could not prevent the head of the family from investing a stranger with all the rights of the eldest son and making his own sons dependants on the stranger so admitted. The restrictions on the powers of the manager in the matter of the alienation

of the joint family property are clearly later developments. Similarly, the equal rights of the sons in the ancestral property were also subsequent developments, as would appear from the earlier statement of law by Manu in the oft-quoted passage.

भार्या पुत्रश्च दासश्च त्रय एव धनास्मृताः ।

यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनम् ॥

The Arthashastra of Kautilya which is dated the 4th century B. C. states the rule in almost the same terms. See Arthashastra, Book III, Chap. V.

The undisputed authority of the father or the manager over the persons and property of the family can be traced in other ancient systems. To the Romans it was known by the name *Patriapotestas*.

In the Sabha parva of the Mahabharata, the story of King Yudhishtira's gambling with dice has been mentioned, when Yudhishtira staked not only his property and kingdom but his own brothers and wife at which Bhima, the younger brother, got annoyed and spoke to Yudhishtira

न च मे कोपोभूत् सर्वस्येशो हि ना भवान् ।

इमं त्वतिक्रमं मन्ये द्रौपदी यत्र पण्यते ॥

— *Sabhaparva, Chap. 61, Verse 4.*

I did not get angry when you staked our kingdom, property and ourselves too; because you are the master of us all. But I think you have overstepped the bounds of propriety when you have staked Draupadi.

Later on Bhima again says :

यद्येष गुरुरस्माकं धर्मराजो महामनाः ।

न प्रभुः स्यात्कुलस्यास्य न वयं मर्षयेमहि ॥

— *Sabhaparvan, Chap. 70, Verse 12.*

If this Dharma-Raja had not been the eldest amongst us and the manager of our family, we would not have tolerated all this.

When Draupadi asked the Court to decide whether she was a slave or not Karna reminds her :

त्रयः किलेमे त्यधना भवन्ति ।

दासः पुत्रश्चास्वतन्त्रा च नारी ॥

— *Sabhaparvan, Chap. 71, Verse 1.*

"Three persons, indeed, cannot own property—a slave, a son and a wife." The words अस्वतन्त्रा नारी obviously mean a 'wife.' The commentator of the Mahabharata quotes a text of Manu of a similar import :

त्रय एवाधना लोके भार्या दासस्तथा सुतः ।

यत्ते समधिगच्छन्ति यस्यैते तस्य तद्धनम् ॥

In this world, three persons, indeed, cannot hold property: wife, slave and a son. Whatever they acquire will go to them to whom these three belong.

It is thus clear that neither the son nor the wife of the manager held any share in the pro-

perty of the family. In fact they were incapable of owning any property during the life of the husband or the father. The demands of the society in those primitive days were such that the families should not only preserve their property but should also preserve its number. There was a temptation to them to augment the number by admitting strangers. A family was in those days something like a corporation and the exigencies of the society required that there should be numerous sons and numerous wives. That is why there were twelve kinds of sons and eight forms of marriage prevalent among the ancient Hindus. In the Rigvedic period, three kinds of sons were at first recognized. They were the Aurasa, Kshetrāja and Kṛita (born of one's own loins, born of an elder brother's widow from the husband's younger brother and a bought son). But, later on, the Dattaka and the Kṛitrima sons also came to be recognized. The story goes that the sage Vasistha lost his hundred sons and so he begged of Agni to give him a son. Agni replied that he may have any one of the several kinds of sons such as Kṛitrima, Dattaka or Kṛitaka. But Vasistha condemned such sons and insisted on an Aurasa son. A good illustration of the bought son and the self-given son is furnished by the Aitareya Brahman. This is the story of Sunahshepa and I will give here a synopsis of it.

King Harischandra was without a son and he prayed to Varuna to give him a son. The god promised to give a son on the condition that the son should be offered as a sacrifice to him. This was accepted and Harischandra got a son whose name was Rohita. When Rohita came of age, Varuna pressed for the fulfilment of the promise. Harischandra then decided to offer a substitute for his son for the sacrifice. The father and the son went out in search of a substitute. They met one Ajigarta, who was dying of starvation as there was a terrible famine in that tract. Ajigarta had three sons — Sunahpuchha, Sunahshepa and Sunolangula. The mother of the sons would not like to part with the youngest and the father was fond of the eldest. So the parents decided to sell the second son Sunahshepa for one hundred cows. The bargain was settled and Sunahshepa was brought to the sacrificial altar and tied with a rope to the sacrificial post. The priests had not the courage to slaughter the young lad and the father became ready to do it provided he was given another one hundred cows. This was also done and when the father came forward to tear the rope with a knife,

the son prayed to Varuna to save him from the predicament. Varuna was propitiated and released Harischandra from his promise with the result that the life of Sunahshepa was saved. Sunahshepa was then asked as to what he would next do. He declined to go back to his parents and offered himself as a son to Vishvamitra who accepted him as such. He became the *swayamdatta* son of Vishvamitra. It must be remembered in this connexion that he was not the adopted son because he had not been given away in adoption by his parents. He was at first a Kṛita son of Harischandra but he ceased to be so when Varuna freed Harischandra from his obligation and Sunahshepa was also freed from the new tie.

The institutes of Manu enumerate twelve kinds of sons: (1) Aurasa (the legitimate son of the body), (2) Kshetrāja (the son begotten on the widow of the last owner), (3) Dattaka (the son adopted), (4) Kṛitrima (the son made artificially), (5) Gudhotpanna (the son secretly born), (6) Apavidha (the son cast off), (7) Kaneena (the son of an unmarried damsel, daughter), (8) Sahodha (the son received with the wife), (9) Kṛita (the son bought), (10) Punarbhava (the son begotten on a re-married woman) (11) Swayamdatta (the son self-given), (12) Shaudra (the son born of a female slave).

Manu places all these sons into two categories: He enjoins that the first six only are entitled to the property of the father. They are not only kinsmen but heirs also. The last six are only kinsmen but not heirs. Medhatithi and other commentators are inclined to interpret the text to mean that the last six are neither kinsmen nor heirs. It seems that according to the Vedic traditions there is no distinction between the several kinds of sons and it appears that all the sons are entitled to be kinsmen as well as heirs. As time rolled on and population increased, the need for increasing the extent of the family gradually decreased. With this, came the change in the law that only the first six of the sons in the list should be recognized as heirs. At the present day, we recognize only two or three out of these six kinds, the remaining having become obsolete. In the Institutes of Vishnu also mention is made of the twelve kinds of sons, but the order is different. The list is as follows: (1) Aurasa, (2) Kshetrāja, (3) Putrikaputra, (4) Punarbhava, (5) Kaneena, (6) Gudhotpanna, (7) Sahodha, (8) Dattaka, (9) Kṛita, (10) Swayamdatta, (11) Apavidha, (12) Shaudra.

In Manu's list, an adopted son is third whereas in Vishnu's list, he is eighth. Another important difference is that Vishnu enjoins that amongst these 12 sons, each preceding son is preferable to the next in order and he takes the inheritance to the exclusion of the next in order. The son who takes the inheritance is under an obligation to maintain the rest. Vishnu thus preserves the spirit of the Vedic traditions. He makes all twelve kinds of sons heirs of the father but introduces a definite order of succession. It seems that the division of the sons into two categories and the exclusion of Kaneena, Sahodha, Krita, Paunarbhava, Swayamdatta and Shaudra sons, from inheritance is indicative of a progressive state of society and I am inclined to believe that in point of time the institutes of Vishnu were earlier than those of Manu as we have the latter in their present form. The Mahabharata gives a list of the early Hindu law-givers. I have already alluded to the story of the evolution of positive law. In the same connexion, it is pointed out that when positive law was evolved, it was transmitted first to Vishnu who passed it on to the sage Angirasa who, in turn, passed it on to Indra and Mareechi. The latter passed it on to Bhrigu from whom it came to Rishis who gave it to Lokapalas from whom Kashupa got it. It was from Kashupa that Manu got it. The series given above mentions four familiar names, besides that of Manu. They are Vishnu, Angirasa, Mareechi and Bhrigu. The Codes or fragments of Codes of these sages are still in existence and the story referred to tends to support the theory that the law-giver Vishnu preceded Manu in point of time. But I must warn you that the theory has not yet been established. I cannot at this stage resist the temptation of bringing to your notice one passage in the institutes of Vishnu, in which he gives us the description of the society in his time. He enjoins on the king a residence "in a stronghold (the strength of which consists either in (its being surrounded) by a desert or in (a throng of) armed men or in fortifications (of stone, brick or other things) or in water (enclosing it on all sides) or in trees or mountains (sheltering it against a foreign invasion)." The king has to appoint chiefs in every village and also lords : (a) of every ten villages, (b) of every hundred villages, (c) of a whole district.

It appears that these lords were invested with judicial powers. Vishnu provides for appeals from lower lords to higher lords.

Evidently the kingdom in the time of Vishnu was divided into districts and the villages were formed into groups or sub-divisions. The Institutes were clearly made for a politically settled country. There was further a regular system of Courts invested with appellate powers : *vide* Vishnu III-3. From this I pass on to the institution of marriage. It is stated in the Mahabharata that in remote antiquity the institution of marriage did not exist and women used to be loaned to needy persons for procreating sons. But certain it is that in the Rigvedic times, the institution of marriage came into existence. It is also clear that in those days monogamy was the rule. This is consistent with the existence of tribal ownership of property. The woman who was married had a very exalted status. In the tenth mandala of the Rigveda there is a hymn in which there is a prayer and a blessing :

वीरसुर्देवकामा सप्राज्ञी श्वशुरे भव ।

समजन्तु विश्वे देवाः समाना हृदयानि नौ ॥

Be thou mother of heroic children; be devoted to the gods; be thou queen in thy father-in-law's household; may all the gods make the hearts of us two, one.

But with the transition from the tribal ownership to the family ownership, the rule of monogamy could not serve the needs of the society. The family was required to be augmented and strengthened and so there came into existence eight forms of marriage. These forms are as follows : (1) Brahma — in which the father makes a gift of his daughter; (2) Daiva — in which the father makes a gift of his daughter to a priest during the course of the performance of a sacrifice; (3) Arsha — in which the father gives away his daughter after receiving from the bridegroom a cow and bull or two pairs; (4) Prajapatya — in which the father makes a gift of his daughter after he addresses the couple with the text "may both of you perform your duties." The distinguishing feature is that the bridegroom first preferred his suit; (5) Asura — in which the bridegroom obtains the bride after giving as much wealth as possible to the bride and her kinsmen; (6) Gandharva — in which there is a voluntary union of a bride and bridegroom; (7) Rakshasa — in which the bride is forcibly abducted from her home; (8) Paisacha — in which a man seduces a girl who is sleeping, intoxicated or unconscious.

In point of fact the Rakshasa and Paisacha forms were the most primitive methods of obtaining a wife. They hardly deserve the name of marriage. The Rakshasa form still

continues among the hill tribes and is known among all ancient communities as marriage by capture. In point of fact, these eight forms resolve themselves into three forms, viz., the gift of the bride, the sale of the bride and the agreement between the bride and the bridegroom. The Brahma, Daiva Arsha and Prajapatya forms imply that the father had the right to make a gift of his daughter and he transfers his dominion over his daughter to the bridegroom. In the Asura form, there is a sale of the bride for a price. In the Gandharva, Rakshasa and Paisacha forms, the girl was obtained by agreement made either at the time of marriage or secured by force or deceit afterwards. At the present day, the Brahma, Gandharva and Asura forms have survived and the others have become obsolete long ago. The love-marriages of modern times which are perfected by registration can be classed with the Gandharva form, the essence of which is the agreement between the girl and another lover. The father may like to perfect the marriage by Brahma rites or by registration but in essence it is the Gandharva form. I have referred already to a *swayamdatta* son. In Gandharva form, the bride is a *swayamdatta* bride. When King Dushyanta proposed to marry Shakuntala he told her आत्मनैवात्मनो दानं कर्तुमर्हसि धर्मतः "you are yourself competent to make a lawful gift of yourself." (Mahabharata — Adi-parvan, Ch. 73, St. 7.) The *swayamvaras* that used to take place in ancient times were a sub-division of the Gandharva form. There is a belief prevalent among us that the Gandharva form was confined only to the Kshatriyas but this is not so. In the times of Manu, it was lawful for the Brahmanas, Vaishyas and Shudras also : *vide*

ब्राह्मो दैवस्तथैवापः प्राजापत्यस्तथासुरः

गांधर्वो राक्षसश्च पेशाश्चाष्टमोऽधमः ॥

(Ch. 3 V. 21)

पदानुपूर्व्या विप्रस्य क्षत्रस्य चतुरोऽवरान् ।

विदूश्चूडयोस्तु तानेव विद्यादम्यनिराक्षसान् ॥

(Ch. 3, V. 23.)

The Brahmins can marry in the first six forms; the Kshatriya in the last four forms; the Vaishya and Sudra also in the same forms except the Rakshasa.

It is fortunate that the Hindu society has been gradually coming back to the Rigvedic rule of monogamy and it seems to me that with the advance of progressive legislation which has increased the age for marriage, Gandharva form will in course of time be the only lawful form of marriage. It is clear that long before the times of Vishnu and Manu the Hindu society had been divided into the four-fold classifications called the Chaturvarnya. Inter-marriages were common among the four divisions. A Brahman could take a wife from any of the four divisions. A Kshatriya and a Vashya from three and two divisions respectively. A Shudra who was presumably a non-Aryan was confined to his own division but the sons born of the inter-marriages had a right of inheritance. Even a Shudra son had, according to Vishnu, the right of inheritance. But certain it is that in the Mahabharata times, great stress was laid on what is known as *Sawarna* marriage. Draupadi emphasized this aspect when she asked the Kurus whether she could be a slave when she was a married wife of Dharmaraja and belonged to the same Varna : *vide* Mahabharat, Sabhaparva, Chap. 69, Verse 12.

तामिमां धर्मराजस्य भार्या सदृशवर्णजाम् ।

ब्रूत दासीमदासीं वा तत्करिष्यामि कौरवाः ॥

Even in Vedic times, there were not only the *anuloma* marriages but *pratiloma* marriages in which the bridegroom came from the lower Varna. The latter were however definitely forbidden by the time the Dharma Sutras were composed and the Manusmriti was compiled.

These are some of the aspects of the early Hindu law that I place before you today. I promise to continue the subject and deal with other aspects on some other occasion.

Lawyers' right of audience and privileged Courts

(by D. G. KURTKOTI, Advocate, Gadag.)

What makes many practising lawyers look nervous and unhappy today is the burning question of the day. They have not been able to earn a decent income, not even a living practice. Although the general depression may be partly responsible for it,

the main causes appear to be altogether different. Besides, the profession is so crowded with men of real merit in later years that competition is very keen and professional success is difficult to secure even with hard working. Competition results in the inflic-

tion of hardship on individual members but such hardship is justifiable to a certain extent only if it secures to society the elimination of incompetent or dishonest persons and also the survival of the fittest. But competition has altogether over-done itself in the direction so far as the legal profession is concerned. When the bar has been struggling for existence like this, many classes of Courts are introduced in the country in which members of the bar cannot practise. Although the principle is generally accepted that the legal profession should continue to exist, there are still many persons in the country who question the utility of the bar as a social order. These prohibitory laws and rules have not only done great injustice to the profession but have also shaken it to its very foundation. If at all it is to exist, it is necessary that it should be allowed to work at its full height and with dignity. Otherwise it would be far better to abolish the order altogether. It can no longer carry on with a forced hunchback and a semi-starved belly. Though these provisions do not prevent lawyers from practising in other classes of Courts, they are virtually denying the profession's right to exist in an indirect way.

A beginning was made in the direction long ago by introducing the "Village Munsif's" Courts in the Bombay Presidency. Lawyers did not grumble then as the jurisdiction concerned only about trivial cases and the bar was not then so much crowded as it is now. Then the system of arbitration under the law of societies was introduced later on, involving a lion's share of litigation that would have otherwise gone to the regular Courts. Lawyers were not permitted to appear on behalf of any of the parties in any of these proceedings. They did not feel the hot pinch of unemployment for some years after that. Another big and substantial portion of litigation will be shifted to the Debt Adjustment Boards under the Bombay Act, 38 of 1939. Lawyers can appear in these Courts only at their discretion and at the cost of the party employing. It will tend to give rise to favouritism which has done enough mischief in the past. A beginning is made in the same direction on the criminal side also. Benches of Honorary Magistrates will be shortly established in rural areas involving a not negligible portion of criminal litigation. Within the next few years, they might include many more Courts in the same category. There appears to be no definite guarantee when and where they

will stop. Lawyers should be freely allowed to practise in all Courts alike when they are once duly admitted to the profession. Such partial prohibition does not seem to prevail in any of the European Courts. It was declared by the International Congress of Advocates at Liege long ago that an advocate shall have a right to plead in every Court of his country. Besides, it will be far better if all these cases are placed under the jurisdiction of regular Courts. If a new order of administering justice is unnecessarily introduced, it will not only take many years to adjust itself to the requirements of society but also there is no knowing whether it will be able to work successfully and satisfactorily.

No State can hope to pass good laws and administer the State in the best possible way without the help of eminent lawyers. No judiciary can hope to impart even-handed justice and prevent certain existing abuses in the administration without the co-operation of smart legal minds. They can be produced only by a properly maintained legal profession. It is like a breeding farm which produced many statesmen, politicians, Judges and lawyers of distinction in the past and which every civilized country in the world should feel proud to possess and maintain at all costs. The surest way to rank and position in the State lies through the gates of the Bar. This ancient and learned profession was known to exist in India since the 1st Century B. C. Lawyers were then known as traders of law. Though the profession was known to have had some defects and vices in the past, a number of rigid rules and laws are passed in later years regulating the conduct of lawyers. Only persons fit and proper in all respects are admitted to the profession and are liable to be suspended or dismissed in case of unprofessional conduct in addition to prosecution. All the bad qualities and defects that are now attributed to the profession, though not existing in the degree alleged, are generally due to the increased number of privileged Courts which prevent individual members from earning a normal income and leave them in a stranded plight. The legal profession can hardly stoop to spoil its name by doing or undoing things that will never benefit its position. It is after all an order of human beings with human weaknesses and failures. As a matter of fact no other order is as perfect and useful to society as the legal profession. One can find the black sheep in every walk of life and this pro-

acc. No 177243

profession cannot be claimed or expected to be an exception. A frequent cause of poverty is unemployment. An individual who is unemployed for length of time in any line tends gradually to lose his self-respect and to drift lower and lower in the social scale. Therefore it would not be a wise policy to keep him idle and call him mischievous. A sure way of rooting out the few existing evils in the profession is to give it enough employment.

Law is often described as a jealous mistress that does not brook a rival, but she is a dumb mistress. Her chief duty in life is to administer justice and maintain order in the State. She cannot communicate with justice which is said to be blind without the help of her younger sister, the legal profession. The younger sister is bound to live in some form or other as long as the elder is alive, since the latter cannot do without her even for a moment, as she is the means of communication between the other two. If the elder wants to restrict the younger's rights in an improper way or to dismiss her altogether, rivalry between the two is sure to arise and justice would be left alone in darkness to take its own course even during broad daylight. Each must sing the glory of the other and each must respect the genuine and wholesome sentiments of the other. Law must either afford to brook a rival or be on friendly terms so far as the legal profession is concerned, for the simple reason that she cannot dispense with justice. She will be committing a breach of duty if she dispenses with justice. The legal profession is the golden link between law and justice. In the interest of justice every party to litigation must have a right to be represented by a member of the legal profession. The prevention of lawyers from appearing in any class of Courts is opposed to the elementary principles of jurisprudence. It was held by the Prize Court in England during the last World War that even an alien enemy had a right to appear and defend either in person or by a counsel, following a decision of the American Supreme Court. The latter Court emphatically decided long ago that the liability to be sued and the right to defend are inseparable, that a different result would be a blot on jurisprudence and civilization and that there ought to be no doubt on the subject in any tribunal calling itself a Court of justice.

By the by, what is the nature of the justice given by these Courts under the law

of societies and involving claims of unlimited amount? We have no clear idea. They are called arbitration proceedings but the element of consent so very essential for the legality of such proceedings, especially on the part of the debtor is often of a doubtful nature. He is called upon to submit to arbitration for his dues to the society. Decisions can be passed against him if he does not submit, in his absence. The legality of these proceedings cannot be usually questioned in regular Courts. They are not even subject to the appellate or revisional jurisdiction of the High Court. If he has no defence to make, well and good. In many cases he has really got certain valid defences to make. But he does not know how to offer his defence and how to prove it. Being a layman he does not know how to cross-examine the persons who come to prove the liabilities against him, in order to expose their conduct in regard to him. He does not know how to argue out his case. The arbitrators are under no obligation to record a full and verbatim statement of parties and witnesses. The office-bearers of the society are but human beings and are likely to commit human faults. Being more refined and more educated, they can, if they want, take undue advantage of the illiteracy or the simplicity of the debtor. Being more influential in their locality they can make evidence against them difficult to secure. Therefore we have reasons to submit that justice is not a thing to be kept in darkness or confinement like this. In order that the community should enjoy the full benefits of fair justice, it should be open to the moral judgments of good citizens, although it cannot be denied that there should be some finality to judgments of Courts. It might be argued by some that the presence of lawyers in these Courts on behalf of parties might unnecessarily complicate matters which are otherwise speedily and easily disposed of. But it is the fundamental principle of justice that litigants whose claims and liabilities are tried by these Courts should have some satisfaction that they are not in any way wronged by their judgments. They cannot themselves decide it in most cases without the help of some man specialized in litigation. And members of the profession cannot give them this satisfaction unless they are allowed to practise in these Courts. Under these circumstances, the position of litigants in these Courts would be even worse than that of alien enemies. Moreover many of the privileges given to

the ordinary debtor are denied to these debtors whereas the monopolies enjoyed by the societies are not recognized in the case of the private creditor however honest and fair his dealings might be, so that there are two laws for the two sets of creditors and debtors, administered by two different classes of Courts possessing unequal jurisdiction, clearly outraging the principle of equality. If a debtor in ordinary Courts is allowed to appear by a lawyer even with so many privileges on his side, there are reasons many times stronger for him to appear by a lawyer in these Courts.

The introduction of these privileged money-lenders has not done enough good to the people for whom it was intended. The unfortunate private creditor could not recover his moneys regularly due to so many privileges given to the debtor and the undue delays of the execution proceedings. Therefore he was practically compelled to wind up his business in course of time. The debtor was gradually forced to go to the privileged money-lender for loans. The main objects of the law of societies are, to give facilities for the promotion of thrift and self-help among agriculturists, artisans and persons of limited means. They are no doubt very commendable but were not carried out satisfactorily as a large majority of these debtors did not ordinarily utilize the money advanced to them for the right purposes and were therefore unable to pay it back in full. Further loans to them had to be stopped till the recovery of their arrears, with the result that they could no longer depend upon the society for loans for an indefinite time, even though they wanted to apply the loans for bona fide purposes mentioned in the Act. They could not also go back to the private creditor as they are sure to get a hot reception from him.

They could not carry on their occupations properly without fresh money. It naturally caused great impediment to the free and active circulation of wealth so very essential for the progress and prosperity of the country's business and trade. The number of cases in regular Courts had necessarily to go far down leaving many lawyers in an almost unemployed state. The more impatient of them were driven by the force of circumstances to get along the wrong way of things. The problem of unemployment tended to become very complex and resulted in great economic loss to a major and important section of the community. It is definite evidence that the community is not working to the best possible advantage and that events are moving in a vicious circle. These results are ghastly enough to call for speedy legislation to set right matters. The commands of the State must show on their very faces that the State is justified in making them and the State must show that it is justified in continuing the existing commands even after it has realized that they are not working to the best advantage of the maximum number of people. One common law and procedure should be passed governing both classes of debtors and creditors. A single class of Courts should be established to try all kinds of cases alike, giving the right of audience to all members of the Bar. The proper remedy for this disease of unemployment and economic depression does not lie in curtailing the legitimate rights of any particular classes of people to carry on their trade or profession in a decent and healthy atmosphere but in making another bona fide attempt to take measures to increase the earning capacity of individual members of the community to the maximum possible extent.

Hindu Law of Marriage and the Special Marriage Act (1872)

by S. Y. ABHYANKAR, B.A. LL.B., Advocate, High Court, Bombay.

Recently the question of the Hindu Marriage rights has come before the society in different forms. Owing to the difficulties, both real and supposed, resort is being had to the special provisions of the Special Marriage Act and the marriages registered under the Act have been in vogue recently. One of the difficulties which is being felt and to obviate which resort is being had to marriage under this Act is the prohibition for Sagotra marriage. Some others feel

the necessity for a certificate of marriage as a conclusive proof of the same. It is also thought that it is more convenient to have a marriage performed under the same Act as it provides the facility for a divorce in the event of the couple not agreeing. In this article it is proposed to consider all these questions and to take a stock of the benefit and losses of the Special Marriage Act.

Even the supporters of the Special

Marriage Act have condemned it in no uncertain terms and the anomalies of the Act have been pointed out very ably by Mr. K. B. Gajendragadkar of Satara. Sir Harising Gour in the Hindu Code has also summarised the effects of this Act and has remarked that the Act has introduced a conundrum which he explains as follows:—A person who is allowed to marry as a Hindu after making a declaration to that effect loses practically all the rights of a Hindu and becomes a non-Hindu for all practical purposes. And all that the person marrying under the Act gets is, in the words of Sir Harising Gour, "that he is relieved from the 'incubus' of the joint family weighing on him."

To facilitate the taking of the stock it is proposed to refer briefly to the several restrictions on marriage under the Hindu law, so that one may easily know what gain or loss is incurred by the person marrying under this Act and the society in general.

Under the Hindu law as it is understood today it is the life-long union of one male with one or more women for the continuance of the family and other rights. It is a sacrament and not a mere contract. It is endogamous in certain respects and exogamous in others. A male can marry any female of his own *varna* and also of the other *varnas* mentioned in the scale of the *varnas* and the old authorities are that a Brahmin can marry a woman of all *varnas* and the others can marry a Kshtriya, Vaishya and Shudra woman of their own *varna* and the remaining *varnas* next in the scale. But no marriage by a male with a female in the reverse order is valid. With respect to marriage by a man or a woman of one religion with a woman or man of another religion, there is no clear provision in the Hindu law. But, probably, as Dr. Ketkar has put it, such marriages were allowed in practice and provision was made for the difference of religion by the bride being allowed to bring her own God to her husband's house. Restriction on the choice of the mates may be on the ground of (i) consanguinity and affinity (ii) gotra (iii) eugenic grounds. We shall take these restrictions in order.

Consanguinity: A man cannot marry a woman who is his own *sapinda*. Sapindaship, so far as marriage is concerned, can be generally said to extend to seven degrees on the father's side and five on the mother's side. It may be that the number of degrees may be different on either side according to

some opinions. But the main point to be noted is that there is a restriction on the choice of mates on the ground of consanguinity. These restrictions in varying degrees are found in every society. And even the Special Marriage Act recognizes this principle. Section 2, cl. 4 is material for this purpose. The parties must not be related to each other in any degree of consanguinity or affinity which would according to any law to which either of them is subject render a marriage between them illegal. And the second proviso is:—"No law or custom as to consanguinity shall prevent them from marrying, unless a relationship can be traced between the parties through some common ancestor who stands to each of them in a nearer relationship than that of great-great-grand father, great-great-grand mother or unless one of the parties is the lineal ancestor or the brother or sister of some lineal ancestor of the other." Thus, there is nothing wrong in the restrictions regarding the choice of mates on the grounds of consanguinity as laid down in the Shastras. Then the next restriction is that both the mates should not be of the same *gotra*. This restriction no doubt works hardship and it may be said to be anomalous to a certain extent. But it has been in existence for over two thousand years at least and there is no reason why it should be abandoned in a hurry. But it is as well to summarise the opposing points of view for clarification of the subject.

It has been doubted by prominent scholars whether the word *gotra* would necessarily mean family. Even the number of *gotras* has been mentioned varying from four to twenty seven and also the number is being added to in the opinion of some. Therefore it is urged that this restriction should be done away with by the Legislature. It may also be urged on the same side, though it is not so urged up till now, that of the various restrictions mentioned in verses 52, 53, and 54 of Yajnavalkya Smriti (Ch .I) not all are mandatory and many of them are more prominent in breach than in observance. The verses run as follows :

अविष्णुतन्महचर्यो लक्षण्याम् स्त्रियमुदहेत् ।

अनन्यपूर्विकां कान्ताम् असर्पिडाम् यवीयसाम् ॥ ५२ ॥

अरोगिणीम् भ्रातृमतीम् असमानार्पगोत्रजाम् ।

पंचमात् सप्तमादूर्ध्वम् मातुनः पितृतस्तथा ॥ ५३ ॥

दशपूरुषविरुद्धात् श्रेष्ठियाणाम् महाकुलात् ।

स्फातादपि न संचारिरोगदोषपमन्वितात् ॥ ५४ ॥

Of these the restriction as to अरोगिणीन् healthy, भ्रातृमतीन् with brothers, are not re-

garded as mandatory in the sense that the marriage would be invalid if these restrictions are not observed. Nor are the other restrictions viz. अनन्यपूर्विकम् her not being previously betrothed or her being कान्ताम् loveable are observed in the sense that the marriage becomes void. Nor is the restriction mentioned in verse 54 viz., that she should be from a family not affected with contagious diseases is observed in the same sense. If, therefore, out of the restrictions enumerated in the above verses practically all are not regarded as mandatory, it is diffi-

cult to see why this particular restriction regarding *gotra* should be regarded as mandatory. But all the same this point should not be decided in a hurry. Dr. Pandhari-nath Walvalkar has in his recent book on 'Hindu Social Institutions' given a warning that in view of the modern works on sociology which give prominence to heredity, the Hindu scholars should look deeply into the methods of exogamy and indogamy and test the validity of their restrictions in the light of modern science.

(To be continued.)

REVIEWS

The Indian Sale of Goods Act, 1930, (1941 Edn.), by OM PRAKASH AGGARWALA, M.A., and assisted by N. K. IYER, M.A., B.L., Published by Lahore Law Depot, Law Publishers and Booksellers, 5 Kachery Road, Lahore. Pages 800. Price Rs. 7-8-0.

This appears to be an up-to-date commentary on the Sale of Goods Act. The more recent cases have been dealt with in the addenda. The principles of Indian and English law have been lucidly explained with reference to relevant case law and the differences between the two have been clearly pointed out. The appendices contain much useful information. The index is exhaustive and well-arranged. We are sure that the book will be of great use to the Bench and the Bar.

The All-India Registration Manual incorporating the Indian Registration Act, by V. SITARAMA SWAMI, B.A., B.L., *Cocanada*. Pages about 350. Price Rs. 4.

The notes to the sections of the Registration Act are exhaustive and contain up-to-date references to all rules and notifications under the Act. The principles of law have been clearly stated in the light of the leading decisions. All the important rules in force in the several provinces have been included. The book is bound to be useful to lawyers, registering officers and to the general public as a book for ready reference.

Law and Procedure of Criminal Appeals, by NAGENDRA NATH BOSE, Published by Eastern Law House, Law Publishers and Booksellers, 15, College Square, Calcutta. Pages over 500. Price Rs. 5.

In this book the author has presented the

whole of the Law of Procedure relating to criminal appeals in a connected, continuous and synthetic form. The subject has been divided into suitable headings and sub-headings and the statutory provisions relating to these have been given with exhaustive and critical commentary with reference to cases selected with judicious care and attention. The Appendices contain a lot of useful information such as classification of offences, glossary of legal words and phrases, vernacular Court terms, Latin expressions, anatomy of the human body and medical terms. The printing and get up of the book leave nothing to be desired. We have great pleasure in recommending this book to the legal profession.

The Law of Pleadings in British India with Precedents (6th Edition), by RAI BAHADUR P. C. MOGHA, B.A., LL.B. Published by Eastern Law House, Law Publishers, 15, College Square, Calcutta. Pages over 900. Price Rs. 10.

This book needs no introduction to the legal profession. It has come to be an indispensable guide on the Law of Pleadings. The fact that it has run through six editions in the course of the last 15 years shows its growing popularity and usefulness to the legal profession. In the edition under review, the case law has been brought up-to-date. Several portions have been re-written in view of several new Acts and amendments since the last edition. Rulings reported up to April 1940 have been incorporated. We are sure, this edition too will be of as great use to the legal profession as the previous editions. The printing and get-up are quite good. The price is moderate.

There are also other rules regarding the qualifications for fitness to marry. Manu for instance in Chap. III verses 6 and 7 gives a list of types of families, girls from which should not be accepted, even though the families may be ever so great or rich in kine, horses, sheep, grain or other property. These families are: (1) Family which neglects the Dharmas. (2) One in which Vedas are not studied. (3) One in which no male children are born. (4) One the members of which (a) have thick hair on their body (b) or are subject to any of the following hemorrhoids, pthysis, weakness of digestion, epilepsy and white or black leprosy.

Out of these the third or fourth types of families have to be avoided on biological considerations. Possibly, the Smritikaras seem to be impressed by the influence of heredity on man. A maiden from a family in which there is a hereditary disease prevalent of the type mentioned above is quite likely to be a victim of the disease herself. Again she is likely to transfer it to her progeny. Similar considerations of the influence of heredity seem to have influenced the Smritikaras in prescribing certain other qualifications also.

Thus, a man must not marry a girl with reddish hair or one who has an extra bodily limb or who is sickly or has no hair or too much hair on the body. Nor should he marry one who is garrulous or has red eyes. He must not marry a maiden who has no brother or whose father is not known, for, in the former case, there is likelihood of her being made an 'appointed daughter' and in the latter case there is a likelihood of the young man's committing the sin of marrying either a sagotra or a girl born of illicit union. In short, says Manu: A man should marry a maiden free from any bodily defects, with agreeable name, with a gait of a *hans* (swan) or elephant with a moderate quantity of hair on the body and head, with small teeth and delicate limbs. Any of these restrictions cannot be said to be mandatory and the marriage in disregard of these restrictions would not be illegal or void.

This is broadly the Hindu Law of Marriage. It is said that in a marriage according to old rites there is no facility for divorce in the event of the couple not agreeing. In fact it cannot be said that the facilities for divorce are an unmixed blessing even in the countries where they are provided for. The pro-

cedure for obtaining a divorce there is so nauseating that in decent families it is rarely resorted to. So much so that persons in public life have had to suffer because of their marrying a divorced woman. Such a couple is looked down upon by the society itself. Therefore, it is not desirable in the interest of the society to have resort to legislation to introduce this new feature without a strong and genuine support of the public opinion. Now let us see how far the Special Marriage Act as amended has remedied any of these difficulties.

(1) With respect to facility of marrying a person of different religion, this Act would not be of much use. Section 2 of the Act provides thus: Marriages may be celebrated between persons each of whom professes one or other of the following religions *i. e.*, the Hindu, Buddhist, Sikh or Jain religion. It would follow from this that the marriage can only take place between persons professing these four religions only. So that the Act offers no facility for any indiscriminate marriage between persons professing any two religions other than these. This cannot be an absolute gain; and if late Dr. Ketkar's view referred to in the beginning is correct, there is no gain at all as compared with the Hindu marriage rites. (2) Now with respect to consanguinity there is practically no gain; because cl. 4 which is quoted in the beginning has adopted the prohibition of consanguinity laid down by the personal law of each of the parties. On the contrary, there may be a disadvantage under certain circumstances in having the marriage under this Act in that it disallows polygamy and strictly insists upon monogamy. And it may also be noted that though Hindu law does not disallow polygamy, yet resort to it is allowed only in special cases and with rites specially provided for. (3) Now with respect to gotra, S. 2 sub-s. 4 read with proviso 1 would seem to allow such marriage, because proviso 1 is in these terms: No such law or custom other than one relating to consanguinity or affinity shall prevent them from marrying. The prohibition of sagotra laid down by the personal law of Hindus does not relate to consanguinity or affinity. Therefore the marriage under this Act would be good. (4) It would also allow Pratiloma marriages. As against these advantages we have the following disabilities which are enumerated in ss. 22 to 26 of the Act. They are as follows:

Disabilities under the Special Marriage Act :

(1) Marriage under the Act would *ipso facto* sever the person who marries under the Act from the family. (S. 22.) (2) For the purpose of the right to succession, the person who marries under this Act shall have the same rights and be subject to the same liabilities, as a person to whom the Caste Disabilities Removal Act applies. (S. 23.) (3) Succession to the property of any person professing the religions i. e., Hindu, Buddhist, Sikh and Jain, who marries under this Act and to the property of any issue of such marriage shall be regulated by the provisions of the Indian Succession Act (S. 24). (4) A person marrying under this Act shall not have any right of adoption (S. 25). (5) When a person marries under this Act, his father shall, if he has no other son living, have the right to adopt another person as a son under the law to which he is subject. The implication of this being, that the marriage of any person under this Act may be tantamount to his death so far as the family is concerned and the right to succession is given to him as an outcaste. He has thus to suffer these disadvantages in spite of his declared intention to continue to be a Hindu. This is clearly anomalous.

Therefore, as one looks at this Act generally, the advantages are not sufficient to compensate for the disadvantages. Besides the second generation of the progeny of a couple married under this Act, as amended has yet to come into existence and their rights and liabilities have to come before the Court and therefore their fate is yet unrevealed. It may be arguable under this Act that they cease to be Hindus for all purposes and the right to succession is only given as an exception, and that too under the Caste Disabilities Removal Act, in effect treating him as an outcaste and the declaration of their fathers that they were Hindus would be nugatory as a result of the provisions under this Act. Questions may arise with regard to their own religion, with regard to their marriage with members of orthodox families and with regard also to the degrees of their consanguinity at the time of their marriage. And it is feared that the progeny of such marriages may form a sub-caste of its own and in this way add to the already existing innumerable number of castes. Surely this is not a very desirable result which was probably never

intended by the promoters of this Act. It is suggested therefore to Hindu society, irrespective of their caste, creed, orthodoxy, or heterodoxy, to combine and make a joint appeal to the Government to repeal the whole Act so far as it is applicable to Hindus, Buddhists, Sikhs and Jains. It is also suggested that an effort should be made to have one law with respect to the marriages of Hindus keeping intact the principles with respect to consanguinity and affinity which are universally accepted. The proposed law should also provide for compulsory monogamy. To this extent there will be no difference of opinion, as the principles underlying this idea are acceptable to all. The debatable points with respect to sagotra and pratiloma marriages should be decided according to genuine public opinion.

There is one further suggestion to be made that in case a new law as proposed above cannot be resorted to, a law for the registration of Hindu marriages on the lines of the Parsi Marriage Act should be immediately passed authorising the registration of the marriages performed under the old rites on a certificate signed by the priest, the guardians of the parties if the parties are minors and by two Hindu witnesses. This certificate should be regarded as a conclusive proof of the marriage.

It is also necessary to suggest some such provision with respect to remarriages which are not registered under the Special Marriage Act. One other point which deserves more attention is the international aspect of marriage. A marriage affects a man's status and the law affecting that status must be enacted by Legislature of his domicile. After the introduction of the Provincial Autonomy by the Government of India Statute of 1935, all the provinces in British India would be independent states ; and any law passed with regard to marriage or divorce would have to be passed by the Central Legislature and if it is to be made binding on both the British India and the Indian India, it will have to be passed by the Federal Legislature also. Any Act relating to marriage and divorce passed by the Indian states would not be effective in British India, as well as amongst the different states, and curiously enough the international character of marriage and divorce has not been taken into consideration in the discussion of this question.

by B. BANERJI, M.A., LL.B., *Advocate, Lahore and Agent, Federal Court.*

Those who are against the extension of the Federal Court's appellate powers argue that because Canada allows appeals to the Privy Council therefore India should do likewise. Let us examine this "Canada" argument a little closely.

The counterpart of the Federal Court in Canada is the Supreme Court of Canada. Appeals lie to the Privy Council from the decisions of the Canadian Supreme Court not as a matter of right but by the grant of special leave by the Privy Council in exercise of the Royal Prerogative. The jurisdiction of the Privy Council vis a vis India will be if anything a little wider even after the extension of the Federal Court's appellate powers. From the appellate decisions of the Federal Court, under the Government of India Act, 1935, appeals lie to the Privy Council either by the leave of the Federal Court or of the Privy Council. The granting of such leave is governed by the same principles as are applicable in the case of Canada. The language used by their Lordships of the Privy Council in AIR 1940 P C 54¹ in which such leave was asked for is almost the same as used in the leading Canadian case, (1879) 5 A C 115.² From the original decisions of the Federal Court appeals lie to the Privy Council as a matter of right. In view of the fact that India's population is much more numerous than Canada's, more appeals will be going to the Privy Council from the Federal Court, even after the extension of its appellate powers, than come to-day from Canada. This should re-assure those who are apprehensive that extension of the Federal Court's appellate powers will put an end to India's connexion with the Privy Council.

The Statute of Westminster gives to the Dominions the right to abolish the prerogative to entertain appeals from the Dominion Courts. This has been done by Eire. As a matter of fact no appeals now go from South Africa and the exercise of the prerogative in (1934) A C 570³ raised a storm of protest and the abolition of the prerogative has been mooted. From the Australian High Court, appeals lie to the Privy Council only on a certificate by the High Court. Such certificate is withheld as a matter of principle in all constitutional cases and granted only once in a while in other classes of cases.

The extension of the Federal Court's appellate powers means that the decisions of the Indian High Courts which are to-day exclusively appealable to the Privy Council will be, exclusively or concurrently with the Privy Council, appealable to the Federal Court. From the State Courts in Australia and the provincial Courts in Canada (except in criminal cases) there is a concurrent right of appeal to the Privy Council. In no Dominion is the Central Court put in the cold storage and exclusive right to entertain appeals vested in the Privy Council. That is a state of affairs possible only in India. (It may be added that in 1938 the Minister of Justice in Canada supported a proposal to abolish altogether State appeals to the Privy Council.)

Why is this anomaly possible? If some people are in favour of retaining this anomaly, it is primarily due to the fear that the Federal Court may not come up to the high standard of the Privy Council in impartiality, independence and breadth of outlook. There are misgivings about the composition of the Court when a fairly large number of Judges will have to be appointed. If some of the recent appointments to the High Courts are any guide, doubts are entertained whether the seats on the Federal Court Bench will go to the men endowed with the highest efficiency, integrity and independence irrespective of all other considerations.

But are these the doubts and misgivings that are preventing the British Government in India and in England to undertake legislation under S. 206 of the Constitution Act or is it the silent pressure of vested interests in London?

1. ('40) 27 AIR 1940 P C 54 : 187 I C 1 : 41 Cr L J 413 : I L R (1940) Kar P C 132 : I L R (1940) Lah 443 : 67 I A 122 (P O), Hori Ram Singh v. Emperor.
2. (1879) 5 A C 115 : 49 L J P C 37 : 41 L T 662, Valin v. Langlois.

3. (1934) 1934 A C 570 : 103 L J P C 174 : 50 T L R 568, Pearl Assurance Co. v. Government of the Union of South Africa.

Part Payments and Limitation

by RACHURY HANUMANTHA RAO, *Pleader, Vizianagram.*

Despite the latest authoritative pronouncement of the Judicial Committee of the Privy Council in AIR 1940 P C 63¹ the law of limitation as effected by part payments

1. ('40) 27 A I R 1940 P C 63 : 187 I C 233 : I L R (1940) Kar P C 134 : I L R (1940) Lah 470 : 67 I A 160 (P O), Rama Shah v. Lal Chand.

of debts still seems to remain in a state of some confusion and doubt. The decision is an authority on the general construction and effect of S. 20, Limitation Act, and should not be confined in its scope to the particular case of part payment dealt with in it, because their Lordships stated at the very commencement of their judgment that

this appeal raises questions as to the true construction and effect of S. 20, Limitation Act (9 of 1908), as amended by the Limitation Amendment Act (1 of 1927). Conflicting decisions in India have made it desirable that their Lordships should construe the section.

It is clear from the above passage that their Lordships wanted to set at rest the conflict of opinion in India regarding the interpretation of the section, and therefore, though not specifically stated, any decision contrary to the principles of the decision of their Lordships, must be deemed to have been overruled, and no longer good law. The decision has far-reaching consequences, as it practically revolutionises the law of part payments, and is likely in its turn to form the subject-matter of conflicting decisions in India in the near future.

Their Lordships of the Privy Council in A I R 1940 P C 63¹ had to deal with a case of payment by the debtor on account of an interest bearing debt, without appropriating the sum paid either towards interest or principal. There was an endorsement on the note in the handwriting of the defendant, and signed by him: "Paid Rs. 100 today in this pronote. (sd.) Lal Chand Bahri, 24th January 1933." The pronote was executed on 4th February 1930 for Rs. 18,500. Their Lordships, approving the opinion of the learned Chief Justice in the Full Bench case of Allahabad, A I R 1935 All 946² which was also a case of an "open payment" of this sort, i.e., where the debtor made no appropriation either towards interest or principal, held that it cannot be treated as a payment of interest "as such" as required by S. 20. Their Lordships said that the words "as such" had long been given a settled meaning, involving that the intention of the debtor must be shown to have been that the payment should go towards interest, and that the words have lost nothing of their previous meaning. The intention of the debtor being the decisive factor, appropriation by the creditor towards interest cannot make it a payment of interest "as

such" to save limitation under S. 20. Their Lordships however said

that the intention of the debtor may be proved not only by statements made by him at the time of payment, but in any other manner and may clearly appear from the circumstances of the case.

So that the "open payment" can be treated as a part payment of the principal, the other type of payment mentioned in S. 20; their Lordships said that the words "as such" not having been used by the Legislature in connexion with it, and hence the debtor's intention not being material, either of the two contingencies must exist, an appropriation of the amount by the creditor before the period prescribed, or the payment exceeding the interest then due. Their Lordships also laid down that the character of the payment, as intended to go towards interest or principal need not appear by the writing, nor must it be ascertained or ascertainable at the date of the payment, and rejected the "old rule," that it is the right of the creditor to have payments treated in account as liquidating the interest before the principal, and also the argument that a payment on general account must either be a payment of interest as such or a part payment of the principal, as "there are additional possibilities as well." Their Lordships decreed the suit, treating it as a part payment of principal, as they found from accounts that the creditor appropriated the amount towards principal before the prescribed period of limitation. Their Lordships observed as follows:

There are indeed four possibilities as to the debtor's intention—(1) intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go both against interest and principal, and (4) no intention of appropriation as between interest and principal.

Of these four types of payment, the first two clearly save limitation under S. 20, and their Lordships having clearly expressed their opinion regarding the fourth, the position of a payment of the third type, expressed to go against both principal and interest, is left in doubt. Besides, the law on the subject of part payments and their saving limitation would have been extremely clear and self-contained had their Lordships considered the question whether the part payment, which is useless to check limitation under S. 20, is useful under S. 19 as an acknowledgment, construing both the sections together. Could it be relied on as an acknowledgment under S. 19, the fact that it is useless under S. 20 is a matter of little significance, and such reliance dispenses with the necessity to investigate into intentions of

2. ('35) 22 A I R 1935 All 946 : 159 I C 387 : 58 All 261 : 1935 A L J 1029 (F B), Udaypal Singh v. Lakshmi Chand.

debtors and appropriations by creditors, to prove which unscrupulous litigants are most likely to lead Courts into mires of false and fabricated oral and documentary evidence, the scope for which must be completely eliminated if possible. Had their Lordships considered the question and come to the conclusion that the payment can be treated as an acknowledgment, the trouble and time of making a detailed examination of the voluminous accounts would have been saved.

The question therefore is what is the effect of S. 20 on a payment of the third type, when the debtor expresses that it goes against both interest and principal, a very common form. Can it be treated as a payment of interest "as such" or as part payment of the principal, simply because the debtor expressed it to go both against interest and principal, apart of course from the question of proof aliunde of his intention and the creditor's appropriation, and also supposing that the payment is insufficient to discharge completely either of them? The question arises how much is intended to be appropriated towards interest, and how much towards principal. That being not clear, it is equivalent to expression of no intention, because there will be a thousand possibilities in making the appropriations, many inevitably being contrary to the debtor's intention. The specification by the debtor, so that a payment can be treated as a payment of interest as such, must be so clear as to completely exclude the creditor's right of appropriation as he likes; he should have no option but to follow the debtor's instructions. It was said in A I R 1935 ALL 946² that

the debtor should distinctly appropriate it towards interest and inform the creditor that he is doing so, so that the creditor thereafter may not have the option of appropriating it towards the principal.

The principle applicable has been clearly stated in 43 I C 812³ thus:

In other words, the payment must be of an unambiguous character. If the payment is of an ambiguous character and it is merely open to the creditor to make an appropriation according to choice, the payment cannot be treated as a payment of interest as such.

So it cannot be treated as a payment of interest "as such." For want of a definite and unequivocal specification of the debtor's intention that a particular sum should go in discharge of part of principal, and on account of the expressly rejected theory that because it is not a payment of interest it must be a payment of principal, such an ambiguous

3. ('18) 5 A I R 1918 Cal 477 : 48 I C 812 : 27 C L J 141, Charu Chandra v. Karan Buxa.

payment expressed to go partly against interest and partly against principal, cannot be treated as a part payment of principal, which undoubtedly it would be only if in fact the creditor makes an appropriation of any definite sum in time towards principal, or it exceeds the outstanding interest. Thus, such a payment is clearly equivalent to an "open payment" and does in no way stand on a better footing and is subject to the same law. The expression "principal and interest" is synonymous with "debt," and is only its elucidation.

The next question is whether the "open payment," or payment expressed to be partly towards principal and partly towards interest, (which has been shown to be practically identical with an open payment) can be treated as an "acknowledgment" within the meaning of S. 19, so as to be capable to check the statute of limitation.

This leads us to the question what is an acknowledgment. The provision relating to acknowledgments is contained in S. 19, which does not define the term, but according to which an acknowledgment (1) in writing (2) signed by the debtor, (3) in respect of a particular debt, (4) made before the expiration of the prescribed period of limitation, would give a fresh starting point of limitation, for realizing that debt, and it is stated in Explanation I that it need not specify the exact nature of the debt, and may be coupled with a refusal to pay, i. e., it is not necessary that there should be a promise to pay. It is nothing more than a simple admission of a debt. It has been clearly stated in 33 Cal 1047⁴ that the word 'acknowledgment' is not a word of art and must be construed in its plain literal sense, and that the acknowledgment relied upon need not be express but may be implied from the circumstances of each case, and from the language used. That an acknowledgment must be of a subsisting liability, and that it need not be expressly made but can be a matter of inference or implication had been stated in several later decisions in India following the above Privy Council case : A I R 1922 Mad 104,⁵ A I R 1924 Mad 286,⁶ A I R 1927 Mad 219,⁷ A I R 1926 Nag

4. ('06) 33 Cal 1047 : 2 N L R 190 : 33 I A 165 : 4 O L J 94 : 10 O W N 874 (PO), Maniram Seth v. Seth Rupchand.

5. ('22) 9 AIR 1922 Mad 104 : 70 I O 576 : 45 Mad 448 : 42 M L J 268, Kandaswami v. Suppammal.

6. ('24) 11 AIR 1924 Mad 286 : 77 I O 740 : 46 M L J 1, Official Assignee v. Subramania Iyer.

7. ('27) 14 AIR 1927 Mad 219 : 100 I O 10 : 50 Mad 548 : 51 M L J 856, Swaminatha v. Subbarama.

252,⁸ A I R 1930 Oudh 67⁹ and A I R 1926 Sind 264.¹⁰ Again, with regard to the construction of S. 19, it is said that,

it is but just and reasonable that the section should be construed so as to afford every possible support to a just and lawful claim against an unjust and unconscionable resistance to that claim: A I R 1925 Mad 675,¹¹

and that

a construction favourable to the plaintiffs should be placed as far as possible: A I R 1930 Mad 991.¹²

Therefore having regard to the above principle of liberal construction of the section, and the permissibility of drawing an inference of an acknowledgment of subsisting liability from the language employed and the circumstances, what is the logical inference that is deducible from a part payment, (1) with an endorsement by the debtor on the back of the instrument evidencing the debt, and (2) signed by him, (3) before the expiration of the prescribed period, (4) stated to be paid under the debt or towards the principal and interest, (5) the payment being sufficient to discharge completely neither the principal nor even the interest, and (6) there being no denial of liability to pay the balance, (7) nor a statement that it was in full discharge, and also (8) accompanied by the fact that the debtor allows, even after the payment, the instrument to be in the custody of the creditor? It obviously satisfies completely all the four essential requirements under S. 19 for a valid acknowledgment of liability enumerated above, and leads to the only irresistible conclusion that the debtor admitted his liability by necessary implication to pay the balance. It therefore follows that the part payment under a debt, even without any specification, endorsed on the back of the instrument evidencing the debt, and signed by the debtor before the period of limitation prescribed (a payment of the type considered in A I R 1940 P C 63,¹ or an ambiguous payment towards principal and interest) has always to be interpreted as an acknowledgment of a subsisting liability, coupled with an implied promise to pay the balance, which will save limitation under S. 19. This is the view which at once appeals both to one's commonsense and sense of equity.

8. ('26) 13 A I R 1926 Nag 252 : 91 I C 402, Raghoba v. Gopi.

9. ('30) 17 A I R 1930 Oudh 67 : 5 Luck 446 : 6 O W N 943, Balbhadar Singh v. Sheo Pearl Lal.

10. ('26) 13 A I R 1926 Sind 264 : 96 I C 79 : 21 S L R 336, Gordhandas v. Firm Gokal Khataoo.

11. ('25) 12 A I R 1925 Mad 675 : 91 I C 833, Kambil Atchutan v. K. Abdu.

12. ('30) 17 A I R 1930 Mad 991 : 128 I C 867 : 54 Mad 445 : 59 M L J 881, Seshayya v. Subbadu.

This view is also supported by several decisions. In 40 Mad 698,¹³ which was a case of an open payment endorsed and signed by the mortgagor on the back of the mortgage bond, it was laid down that Ss. 19 and 20, Limitation Act, are independent of each other and not mutually exclusive, and that a payment which is useless under S. 20 may nevertheless save limitation under S. 19 as an acknowledgment. Srinivasa Iyengar, J., said:

I construe the endorsement as meaning that the debtor made a part payment of the amount due on the bond (on that day over Rs. 1500 was due as shown on the bond) which is certainly an acknowledgment that more money was due.

This case was followed in A I R 1923 Bom 239,¹⁴ which is also a case of an open payment endorsed and signed on the back of the pronote, and in which it was thus observed :

I think this an endorsement by which the promisor recorded that he had paid Rs. 671-12-0 against the liability which stood against his name on the promissory note, and consequently he admitted his liability to pay the balance. It seems to me that as a matter of common law an endorsement on a promissory note by the promisor is an acknowledgement of liability.

40 Mad 698¹³ was also followed in A I R 1926 Nag 252,⁸ wherein it was thus stated :

The payments made have not fully satisfied either bond, and had this been the intention of the parties, a specific reference thereto would have undoubtedly appeared in the endorsement. The only reasonable implication to be put on the endorsement is that the defendant . . . admitted by implication that the balance due under each bond was still owing by him.

In A I R 1924 Mad 123,¹⁵ it was decided that a part payment of interest and principal saves limitation under S. 19. In A I R 1935 Mad 371,¹⁶ Venkatasubba Rao, J., following the English decision in (1882) 19 Ch D 539,¹⁷ observed as follows :

I think it must be regarded as a fundamental principle that the Statute is not checked unless the part payment is made as an admission of a right in the recipient in the balance of the debt; in other words the payment must be such as to amount to an acknowledgment of liability It is said that the principle on which a part payment saves the Statute is that it admits a larger debt to be due at the time of the part payment; in other words, it recognizes or affirms the indebtedness. It would no doubt be unsafe to construe or give effect to the provisions

13. ('17) 4 A I R 1917 Mad 805 : 36 I C 240 : 40 Mad 698, Venkata Krishniah v. Subbarayudu.

14. ('23) 10 A I R 1923 Bom 239 : 72 I C 249 : 47 Bom 682 : 25 Bom L R 144, Ganesh Narhar v. Dattatraya Pandurang.

15. ('24) 11 A I R 1924 Mad 123 : 74 I C 777, Ramakrishna v. Pichandi.

16. ('35) 22 A I R 1935 Mad 371 : 157 I C 259 : 68 M L J 73, Appaswami v. Morangan.

17. (1882) 19 Ch D 539 : 51 L J Ch 394 : 46 L T 356 : 30 W R 327, Harlock v. Ashberry.

of an Indian Statute in the light of the English principle, but the English Judges have pointed out that it is a principle of universal application and does not depend for its validity upon the wording of a particular enactment. If a debtor makes a payment which the evidence discloses is only in part, there being nothing in the circumstances to show that he was unwilling to treat it as a part payment, the Court may, and does, very properly infer that the payment implies an admission of a right in the payee to the balance of the debt. Thus from a part payment unaccompanied by an express denial or repudiation an admission of right may be inferred.

In AIR 1936 Mad 616¹⁸ an endorsement of an open part payment was treated as a definite acknowledgment of liability, though not satisfying the requirements of S. 20. AIR 1937 Nag 304,¹⁹ AIR 1938 Rang 84,²⁰ AIR 1938 Rang 401²¹ and AIR 1939 Bom 252²² are other cases following 40 Mad 693,¹³ and treating an open part payment as an acknowledgment of liability for the balance due on the bond under S. 19, though it is stated to be useless as a part payment under S. 20. Some Allahabad cases sound a contradictory note. They state that such a payment, being useless under S. 20, cannot be

18. ('36) 23 AIR 1936 Mad 616 : 163 I C 803, Chandukutti v. Moosan.

19. ('37) 24 AIR 1937 Nag 304 : 170 I C 213 : ILR (1937) Nag 374, Sunderlal v. Bisahoo.

20. ('38) 25 AIR 1938 Rang 84 : 175 I C 550 : 1937 R L R 421, Kasi Viswanathan v. Lakshmanan.

21. ('38) 25 AIR 1938 Rang 401 : 178 I C 869 : 1938 R L R 594, U Tun Maung v. Ah Choy.

22. ('39) 26 AIR 1939 Bom 252 : 182 I C 965 : 41 Bom L R 455, Tayerali v. Garabad Sadu.

treated as an acknowledgment of liability for the balance due on the bond under S. 19, but can be so treated only in respect of the sum actually paid, but of nothing more : AIR 1933 ALL 453,²³ followed in AIR 1935 ALL 946,² and AIR 1939 ALL 177.²⁴ In AIR 1939 ALL 177,²⁴ 40 Mad 693¹³ and AIR 1923 Bom 239¹⁴ were referred to and dissented, and it was also stated that the learned Judges in the latter decision which followed the former were guided by the Common law of England. The decision in AIR 1933 ALL 453²³ is really distinguishable, and has also been distinguished in AIR 1937 Nag 304¹⁹ and AIR 1938 Rang 84,²⁰ and AIR 1935 ALL 946² is distinguished in AIR 1939 Bom 252.²² Therefore, from the above review of the case law, it may be concluded that the preponderance of judicial opinion is in favour of the view that a part payment without an unambiguous specification of intention, though useless under section 20, gives rise to a necessary and logical inference of the acknowledgment of a subsisting liability, coupled with an implied promise to pay the balance, and hence can save limitation under S. 19, if it satisfies the requirements of writing and signature.

(To be continued.)

23. ('33) 20 AIR 1933 All 453 : 144 I C 899 : 55 All 632 : 1933 A L J 930, Ram Prasad v. Binaek.

24. ('39) 26 AIR 1939 All 177 : 180 I C 535 : ILR (1939) All 200 : 1938 A L J 1233, Ishri Prasad v. Chandrabhan Prasad.

REVIEWS

For Necessary Action (Speeches and Judgments of Sir Douglas Young, Chief Justice, High Court of Judicature at Lahore) Vol. 2. Edited by SHRI RAM, B.A., LL.B., Advocate, Allahabad, and V. M. KULKARNI, B.A., LL.B., Editor, Indian Cases, Lahore. Published by Indian Cases Ltd., Lahore. Pages 164. Price Rs. 2.8.0.

This book is a supplement to the one published in 1938. Since 1938, the Hon'ble Justice Young has delivered many important and instructive speeches and judgments and these have been compiled and published in this book. As observed by us while reviewing the first volume published in 1938, Sir Douglas has been taking keen interest in several things, viz., removing corruption and clearing of arrears among the subordinate judiciary, trying to check excesses or torture by the police or any dishonest or fraudulent act on the part of persons placed in position of trust and responsibility, the Boyscout movement, etc. His Lordship has identified himself so much

with the Boyscout movement that he has been called the "Scout Judge." Besides the important public utterances and judgments of his Lordship, this book contains in the form of a War Diary an account of the thrilling experiences of Lady Young and her ultimate escape. We are sure that this supplementary volume also will be read with great interest by the public at large. As the profits made out of the sale of this book also are going to be utilized for the betterment of the boys of India to whom it is dedicated, we trust the public will extend their patronage to this book also as they appear to have done in a large measure to the first volume. The printing and get-up are good and the price quite moderate.

The "Yearly Digest" of Indian and Select English Cases, 1940, by R. NARAYANASWAMI IYER, B.A., B.L. Published by the Madras Law Journal Office, Mylapore, Madras. 1296 columns. Price Rs. 4.

The Indian cases reported in all the important legal journals and select English

cases have been digested under appropriate headings and sub-headings. As usual, the Table of Cases digested and Index of Cases followed, overruled, etc., are also given.

The Law of Arbitration in India, by SHAMBHU DAYAL SINGH, M.A., LL.B., *Azamgarh*. The Book can be had from Allahabad Weekly Reporter Office, Indian Law House, Allahabad (U. P.). Pages 422. Price Rs. 5.

In this book the author has presented an exhaustive and analytical commentary on the Arbitration Act, 1940. The principles have been clearly expressed in the light of the Indian and relevant English rulings. The entire law of arbitration and allied subjects have been dealt with in the Introduction. The Appendices contain the repealed enactments *viz.*, Sch. 2, Civil P. C., and the Arbitration Act, 1899, the Arbitration (Protocol and Convention) Act, 1937, the English Arbitration Acts and extracts from the Civil Justice Committee Report of 1924-1925. We are sure that the book will be found to be of great use to the legal profession.

The Indian Income-tax Act, by A. C. SAMPATH IYENGAR, B.A., B.L., *Advocate, High Courts, Madras and Bangalore*. The book can be had from the Madras Law Journal Office, Mylapore, Madras. Pages over 960. Price Rs. 10-8-0.

This appears to be the latest commentary on the Income-tax Act as amended up-to-date. The principles of law on the subject have been stated with suitable illustrations wherever necessary. The case law has been brought up to the end of 1940. In citing cases, reference has usefully been given to I. L. R., A. I. R. and to I. T. C. or I. T. R. Reference to the particular page of the judgment is also given where the judgment extends over several pages. The Appendices contain the Central Board of Revenue Act (1924), the Excess Profits Tax Act (1940), Income-tax, Rules, etc. The book is bound to meet with a good reception at the hands of the Bench, the Bar and the Income-tax Department. The printing and get-up are good.

Leading Cases on Hindu Law, by LALLA RAMA TEWARI, B.A., LL.B., *Advocate, Allahabad*. The book can be had from Ram Narain Lal, Law Publisher, Katra Road, Allahabad. Pages 650. Price Rs. 8.

In this book, the author has collected 86 select decisions of the Privy Council on Hindu law and explained the principles

laid down in them. He has considered these decisions under main chapter headings. Each judgment has been dealt with under four distinct heads, namely, (1) Facts (2) Points involved (3) Decision and (4) Comment. He has also referred to the original texts of the Smritis and the commentaries wherever necessary. The Appendix contains a brief note on the principles of interpretation of texts as laid down by the Smritis and the Purva-Mimansa of Jaimini. The book is bound to be very useful to lawyers and students of Hindu law. We may, however, point out that the addition of an index at the end and the giving of pages of the body of the book where each case is considered under the Table of Cases (with main principles laid down) also would have greatly facilitated reference to the book.

The Arbitration Act, 1940, by N. L. GUPTA, B.Sc., LL.B., U. P. C. S. (Judicial). The book can be had from Law Publishing House, 33, Sheocharan Lal Road, Allahabad. Pages over 300. Price Rs. 5.

This is yet another commentary on the Arbitration Act, 1940. The principle and scope of the sections have been explained with reference to the case law and reports of the Select Committee and the Civil Justice Committee of 1925, the full texts of which are given in the Appendix. The English law on which this Act is mostly based is also given in the Appendix. The Arbitration Act of 1899 and Sch. 2, Civil P. C., which have been repealed by the Act of 1940 and the Arbitration (Protocol and Convention) Act, 1937 have also been usefully included in the Appendix. The book will be found useful by lawyers and others who have something to do with the law of arbitration.

The Law of Hundis and Negotiable Instruments (4th Edn.) by CHIRANJIVA LAL AGARWAL, M.A., LL.B., *Advocate, Lahore*. Published by The University Book Agency, Law Publishers, Kacheri Road, Post Box 257, Lahore. Pages 480. Price Rs. 5-8-0.

In this edition, the author has revised the commentary and made it exhaustive and up-to-date. The principles of law have been stated in clear and concise language with suitable illustrations where necessary. The book is bound to retain its popularity with the students of commercial law and the legal profession. The printing and get-up leave nothing to be desired and the price is moderate.

by RACHURY HANUMANTHA RAO, Pleader, Vizianagram.

(Continued from page 31.)

The last question is how far is the above opinion good law at present. On a study of the cases referred to above, which treated a part payment as an acknowledgment, it will be plain that they are all based on the English theory, whether specifically referred to or not, that a payment of a part of a debt implies an acknowledgment of existing liability coupled with a promise to repay the balance. That is undoubtedly the most equitable doctrine, which has been stated by specific reference to English authorities in A I R 1935 Mad 371¹⁶ to be a doctrine of universal application, but unfortunately this doctrine and this Madras decision have been specifically dissented from in the Privy Council case in A I R 1940 P C 63.¹ A I R 1933 ALL 453²³ decided that a part payment cannot be treated by implication as an acknowledgment of liability in respect of the balance due, sufficient to save limitation under S. 19, and this decision was followed in A I R 1935 ALL 946,² which was approved by the Privy Council in A I R 1940 P C 63.¹ Therefore, it follows from the Privy Council case that an open or ambiguous part payment cannot save limitation under S. 19; and it also seems to follow that ss. 19 and 20, Limitation Act, are not independent of each other, because an express acknowledgment not being an absolute necessity under S. 19, and the general rule of construing the Act, being in favour of the plaintiff, there does not appear to be any valid reason why such a part payment should not be regarded as an acknowledgment. This construction, that ss. 19 and 20 are interrelated, seems to be the proper one, because the effect of treating every part payment, not satisfying the requirements of S. 20, but satisfying the requirements of writing and signature, as an acknowledgment under S. 19, as in the cases referred to, is to completely make S. 20 redundant and nugatory, a disability imposed under S. 20 being removed by S. 19, thus making the two sections apparently inconsistent with each other.

The decision in A I R 1940 P C 63¹ will also be reduced to a dead letter. Such a construction runs counter to the well-established canons of interpretation of statutes. Such a construction should not be placed on any part of an enactment as would nullify or render redundant any other portion of it. The Courts should construe the provisions

of a legislative enactment in such a way as not to impute inconsistency to the Legislature. Where the provisions are reconcilable, the Courts should try to reconcile. They should not attach much importance to a single phrase or clause in one section and overlook the clear provisions in other sections: A I R 1927 Mad 163.²⁵ In interpreting the different provisions of a statute every attempt should be made to avoid inconsistency: A I R 1927 Nag 132²⁶ and A I R 1928 Sind 149.²⁷ One section cannot be used to defeat another section unless it is impossible to effect a reconciliation between them: A I R 1922 P C 17.²⁸

The general rule is that due effect should be given to every part of a statute: A I R 1922 Bom 247.²⁹ Applying this rule of construction of harmony between the different parts of the statute and avoidance of inconsistency, it seems to be reasonable and consistent with the intention of the Legislature that S. 19 deals generally with all types of acknowledgments, a special provision having been enacted in S. 20 relating to a particular type, that relating to part payments, a part payment being itself indicative of the existence of some still further liability. This interpretation completely reconciles the two sections. Thus interpreted, S. 20 overrides S. 19, because the ordinary rule is that when there are two provisions in a statute one general and the other special, the latter must be applied in preference to the former: A I R 1928 Lah 609³⁰ and A I R 1923 Mad 609.³¹ The principle, *generalia specialibus non derogant, specialia derogant generalibus*, has been recognized and as ob-

25. ('27) 14 AIR 1927 Mad 163 : 99 I C 241 : 50 Mad 300 : 51 M L J 719, Rangiah v. Appajirao.

26. ('27) 14 AIR 1927 Nag 132 : 99 I C 635 : 28 N L R 20, Atmaram v. Ganpathi.

27. ('28) 15 AIR 1928 Sind 149 : 111 I C 865 : 29 Cr L J 945 : 22 S L R 349 (FB), Emperor v. Jiand.

28. ('22) 9 AIR 1922 P C 17 : 66 I C 853 : 44 All 165 : 49 I A 60 : 25 O C 8 (PC), Md. Sher Khan v. Swami Dayal.

29. ('22) 9 A I R 1922 Bom 247 : 69 I C 19 : 46 Bom 663 : 24 Bom L R 178 (F B), Mulji Tribhovan v. Dakor Municipality.

30. ('28) 15 A I R 1928 Lah 609 : 111 I C 175 : 9 Lah 701 : 30 P L R 60 (F B), Khan Gul v. Lakha Singh.

31. ('29) 10 A I R 1923 Mad 609 : 73 I C 163 : 24 Cr L J 547 : 46 Mad 449 : 44 M L J 567 (F B), Varisai Rowther v. Emperor.

served in A I R 1923 Cal 507³² by Mookerjee J., illustrations of the doctrine that general provisions do not derogate from special provisions, but that the latter do derogate from the former are by no means rare.

For these reasons it has to be submitted, with due respect, that the above referred to consensus of judicial opinion cannot now be considered as good law, and therefore it follows that S. 19 is not at all applicable to part payments, and a part payment which is useless to check limitation under S. 20 cannot be allowed to do so by interpreting it as an implied acknowledgment of liability under S. 19. This interpretation of Ss. 19 and 20 will undoubtedly affect a large body of unfortunate creditors in this country, as the endorsements "paid towards this debt" and "paid towards principal and interest" are practically the only two forms in actual practice. It looks rather extremely unjust

32. ('23) 10 A I R 1923 Cal 507 : 73 I C 17 : 37 C L J 108 : 27 C W N 210, Md. Mozaharal Ahmad v. Md. Azimaddin.

to punish a considerable section of the public on account of a defectively drafted legislative enactment, which naturally places the public in doubt, which is no wonder, when even the most eminent lawyers and Judges are not agreed as to its exact meaning. In 1929 Coutts-Trotter C. J., said :

I have always regarded the Limitation Act as the worst drafted piece of legislation, which it has been from time to time my great misfortune to be compelled to construe : A I R 1929 Mad 252.³³

In A I R 1940 P C 63¹ it is thus remarked:

It is not very clear why the Legislature should have hesitated to drop the words "as such," and it may well be that the difficulty could best be resolved by their omission.

It is high time that the Legislature should amend the section as suggested above making every part payment sufficiently potent to save limitation, and declare the amendment retrospective.

33. ('29) 16 A I R 1929 Mad 252 : 118 I C 775 : 52 Mad 590 : 56 M L J 555, Palaniappa v. Valliammai Achi.

Child Marriage Restraint Act

by K. B. GAJENDRAGADKAR, B.A. (HONS.), LL.B., *Pleader, Satara City.*

In 42 Bom L R 857¹ the Bombay High Court has given a very important decision in connexion with S. 5, Child Marriage Restraint Act. The bride in the case was above fourteen years of age, the minimum fixed by the Act for the girls. The bridegroom however was less than eighteen, the limit fixed by the Act for men. The trying Magistrate at Kaira convicted the father of the bridegroom under S. 6 of the Act but convicted the father and mother of the bride as well as the priest under S. 5 of the Act. On appeal, the Sessions Judge, Nadiad, took the view that section 5 of the Act contemplates only punishment of those who solemnize a child marriage such as priests, kazes or vakeels, who being strangers are entitled to raise the defence that they had reason to believe that the marriage was not child marriage. The proper section, which applies to parents is S. 6. The Sessions Judge, therefore, set aside the conviction of the parents of the girl who was above fourteen years of age. On appeal against this acquittal by the Government, the High Court upheld the view of the Sessions Judge. This decision of the Bombay High Court sets at rest

in a way the conflict between the decisions of the Madras High Court and Nagpur J. C.'s Court on one hand and the Allahabad High Court on the other. According to Madras (A I R 1937 Mad 490)² and Nagpur (A I R 1932 Nag 174)³ view, parents and guardians of the minor who contracts child marriage can be punished under S. 6 only and not under S. 5 which applies to priests and strangers. But according to Allahabad view (A I R 1936 ALL 11,⁴) S. 5 is wide enough to include parents and the offence contemplated under S. 6 is distinct from the one under S. 5.

The question in the case under consideration was whether making "kanyadan" (कन्यादान) constitutes "performing, conducting or directing a child marriage" within the meaning of S. 5. According to Hindu Shastras, the marriage ceremonies have two aspects, one secular, another spiritual. The essential ceremonies are : (1) the gift of the bride by the father or any other person act-

1. ('40) 27 A I R 1940 Bom 363 : I L R (1940) Bom 709 : 42 Bom L R 857, Emperor v. Fulabhai Bhulabhai.

2. ('37) 24 A I R 1937 Mad 490 : 168 I C 723 : 38 Cr L J 594 : I L R (1937) Mad 854, Public Prosecutor v. Thamanna Rallayya.

3. ('32) 19 A I R 1932 Nag 174 : 142 I C 277 : 28 N L R 302 : 34 Cr L J 311, Ganpatrao Devaji v. Emperor.

4. ('36) 23 A I R 1936 All 11 : 158 I C 1007 : 58 All 402 : 36 Cr L J 1483 : 1935 A L J 1166, Munshi Ram v. Emperor.

ing for the father to the bridegroom known as "kanyadan," (2) invocation of the invincible powers and the propitiation of them through the sacred fire — vivahahoma — (विवाह होम) and (3) the bridegroom and bride walking together seven steps (saptapadi) uttering the sacred marriage vow, to be complementary and loyal to each other in the vicissitudes of life and to share in common *dharma* धर्म (piety) *artha* अर्थ (material prosperity) and *kama* काम (joys of life). Now of these three essentials, the first, namely kanyadan is purely a secular act, whereas the second and the third, namely vivahahoma and saptapadi constitute what may be called the spiritual part of the marriage ceremonies. These two rituals only constitute really the solemnization of marriage.

In these ceremonies the parent or guardian of the bride has much less to do than the bridegroom himself. While parents' function stops with the making of the gift, the bridegroom takes part in the 'homa' as well as saptapadi, i. e., solemnization of the marriage. Thus, technically looking to the wording of the section the parents of the bride cannot be said to "perform, conduct or direct" the marriage. Such, in brief is the legal position. To a popular mind it does seem queer that the parents of the girl who arrange her marriage with a boy under 18 years of age and give her in marriage to him should be regarded as less culpable than the poor priest who acted professionally and recited the mantras just for the gain of few rupees!! It is true that in the strict legal sense, the parents of the girl in the case under discussion cannot be convicted under S. 5 of the Act, but the question is whether they could not have been convicted under S. 6 of the Act which applies to parents. Section 6 of the Act prescribes the punishment for parents or guardian concerned in child marriage. That section reads thus:

(1) Where a minor contracts a child marriage, any person having charge of the minor whether as parents or guardian who does any act to promote the marriage or permits it to be solemnized or negligently fails to prevent it from being solemnized, shall be punishable.

(2) For the purposes of this section, it shall be presumed where the minor has contracted a child marriage, a person having charge of such minor has negligently failed to prevent the marriage from being solemnized.

In this case the girl is stated to be above fourteen years of age. So, though she is not "child" in the eye of the Act yet she is nevertheless "minor" for minor has been defined in the Act as a person of either sex

who is under eighteen years of age. So clearly the parents of the bride in the case in which the bride is the minor can be guilty under S. 6 of the Act. For it can be said, that the parents, having her charge negligently failed to prevent the marriage from being solemnized. In 42 Bom L R 857,¹ the case under discussion, it is stated that the boy Indulal was born on 28th January 1921, but the girl is stated to be only "above fourteen years of age." She is certainly not a "child" in the eye of the Act. Her birth date unfortunately is not given. But if she is under eighteen years of age and hence a minor in the eye of the Act, it is submitted that on the strength of the ruling in A I R 1932 Nag 174³ at p. 177 the parents would have been guilty under S. 6 of the Act. The words "when a minor contracts a child marriage" in S. 6 of the Act having been interpreted more liberally than the language warrants, they are understood to include a case where a child marriage is contracted not only by a minor but also by a major. In other words, the above expression includes even the case of a marriage to which both parties are minors as is in the case under discussion or to which one party only is a minor.

In the case under discussion the trying Magistrate convicted accused 1, the father of the boy, only under S. 6 of the Act but convicted accused 2 and 3, the father and mother of the girl under S. 5 of the Act. The question before their Lordships of the High Court was whether the conviction of the father and mother of the girl who was above fourteen years of age was legal. Really speaking, the Magistrate should have ascertained the exact age of the girl as was done in the case of the boy. If she was found to be below eighteen years of age, i. e., a minor in the eye of the law, then he should have framed a charge under S. 6 of the Act against the father and the mother of the girl and then convicted them under that section. It is submitted that his conviction then would have been upheld. The High Court set aside the conviction passed against the parents of the girl under S. 5. It appears that the High Court could not have altered the conviction under S. 5 to that under S. 6. For, ss. 5 and 6 deal with different offences. Section 5 deals with persons who perform, conduct or direct any child marriage; S. 6 provides punishment for parents or guardian concerned in a child marriage where a minor contracts a child marriage. In this case the accused were not asked to answer a charge under S. 6. They were charged only with S. 5. Therefore, the

High Court could not have convicted the parents under S. 6.

It is submitted with respect, that the High Court should have at the most remanded the case back to the trying Magistrate with instructions to ascertain the exact age of the girl and if she was found below eighteen years of age, then the Magistrate should have framed charge against the parents under S. 6 of the Act. This certainly would have removed the notion in the mind of the general public that the parents of the girl who

arranged her marriage with a boy under eighteen years of age and hence a child in the eye of the Act and gave her in marriage to him should be regarded as innocent under the Act; while the poor priest who merely acted professionally for gain of some few rupees should be regarded as criminal. These are the thoughts in the mind of the present writer when he read the judgment in 42 Bom L R 857.¹ It is requested that legal luminaries and jurists should throw more light on the points discussed in this article.

THE FEDERAL COURT IN INDIA

by RAI SAHIB B. R. BEOTRA, B.A. (HONS.), LL.B.,

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A Federal Court is an indispensable accompaniment of any Federal Government as an independent and impartial tribunal essential to interpret common rights and federal laws and compel obedience to them. It is an essential element in a Federal Constitution. It is the interpreter and guardian of the constitution as well as a tribunal for the determination of disputes between the constituent units of the Federation. The idea of the establishment of the Federal Court in India as embodied in the White Paper scheme received the unanimous support of the Joint Committee on the Indian constitutional reforms and a provision was accordingly made in the Constitution Act of 1935, for the establishment of the Federal Court in India. The Constitution Act of 1935, except Part II thereof, came into force on 1st April 1937 on which date the Federal Court was also established in India. Sir Maurice Gwyer was appointed as its first Chief Justice and Sir Shah Mohammad Sulaiman and Mr. Mukand Ramrao Jaykar as Puisne Judges. In 1939 when Mr. Jaykar was appointed on the Judicial Committee of the Privy Council, his place on the Federal Court was taken by another eminent Judge in the person of Sir Srinivas Varadachariar. Although the Federal Court now consists of the Chief Justice of India and two Puisne Judges, the Constitution Act provides that the number of Puisne Judges shall not exceed six unless and until an address has been presented by the Federal Legislature to the Governor-General for submission to His Majesty praying for an increase in the number of Judges.

The Federal Court is a Court of record

and the law declared by it is recognized as binding on and is followed by all Courts in British India. In the case of a Federated State the law declared by the Federal Court regarding the application and interpretation of the Constitution Act or any Order in Council made thereunder or any matter with respect to which the Federal Legislature has power to make laws in relation to that State, is binding on it. The Court sits at Delhi but it may sit at any other place or places which the Chief Justice in India may, with the approval of the Governor-General, appoint. The salaries of the Judges are fixed by His Majesty in Council and neither the salary of a Judge nor his right in respect of leave of absence or pension can be varied to his disadvantage after his appointment. Every Judge of the Federal Court is appointed by His Majesty by warrant under the Royal Sign Manual and holds office until he attains the age of sixty-five years. He may submit his resignation to the Governor-General. He can only be removed from office by His Majesty on the ground of misbehaviour or of infirmity of mind or body if the Judicial Committee of the Privy Council, on reference being made to them by His Majesty, report that the Judge ought to be removed on any such ground. In order to be eligible for appointment as a Judge of the Federal Court a person must either have been for at least five years a Judge of a High Court in British India or in a Federated State, or he must have been a barrister of England or Northern Ireland or a member of the Faculty of Advocates in Scotland or a pleader of a High Court in British India or in a Federated State for at least ten years.

The Chief Justice of India must be a barrister or a member of the Faculty of Advocates or a pleader, and if he has not already been on the Bench of a High Court for five years or more, he must have had at least fifteen years experience at the Bar. Before he enters upon his office, a Judge of the Federal Court must make and subscribe before the Governor-General or some person appointed by him a prescribed oath. It is interesting to note that a subject of an Indian State who is appointed as a Judge of the Federal Court, reserves the faith and allegiance which he owes to the ruler of his State and only swears to be faithful and to bear true allegiance in his judicial capacity to His Majesty the King-Emperor.

If the post of the Chief Justice falls vacant, or if the Chief Justice is for some other reasons unable to perform his duties, the Governor-General in his discretion is empowered to appoint one of the other Judges to perform the duties of the Chief Justice till another person is appointed by His Majesty to the vacant office or till the Chief Justice resumes his duties. Under the provisions of the Government of India Act 1935, the jurisdiction vested in the Federal Court is of three kinds, *viz.*, advisory, original and appellate. The provisions regarding the advisory jurisdiction of the Federal Court are contained in S. 213 of the Act. This section provides that if at any time it appears to the Governor-General that a question of law has arisen, or is likely to arise, which is of such a nature or of such public importance, that it is expedient to obtain the opinion of the Federal Court thereon, the Governor-General may in his discretion refer that question to the Court for consideration and an expression of opinion thereon. During the last four years, the Governor-General has availed of this section only once *i. e.*, in the matter of the validity of the Central Provinces Petrol Tax Act. (A I R 1939 F C 1.)

The Federal Court has exclusive original jurisdiction in any dispute between the component units *inter se* or between the Federation and one or more of the component units if the dispute involves any question on which the existence or extent of a legal right depends. This jurisdiction does not extend to any dispute which arises under an agreement which expressly provides that the said jurisdiction shall not extend to the dispute. The Act also provides that the jurisdiction of the Federal Court shall not extend to a dispute to which a Federated

State is a party unless the question involved concerns the interpretation of the Constitution Act, or of an Order-in-Council or the Instrument of Accession of that State or arises under an agreement made under S. 125 relating to the administration of the Federal laws in that State. The jurisdiction of the Federal Court also extends to disputes arising under an agreement made after the establishment of the Federation with the approval of the Crown representative between an Indian State on the one hand and the Federation or a Province on the other which expressly provides for such jurisdiction. The Federal Court can only pronounce declaratory judgments. So far only the U. P. Government has invoked the original jurisdiction of the Court in what is commonly known as the Cantonment Case. (A I R 1939 F C 58.)

The law regarding the appellate jurisdiction of the Federal Court is contained in Ss. 205 and 207, Constitution Act. The first mentioned section deals with appeals from High Court in British India while the latter section provides for appeals from High Courts in Federated States. An appeal lies to the Federal Court from any judgment, decree or final order of a High Court in British India if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution Act. A duty has been imposed on the High Courts to consider in every case whether any such question is involved in the case or not and to give or to withhold a certificate of its own motion. Such a certificate is a necessary condition precedent to all appeals to Federal Court and if the High Court refuses to grant it, it is not for the Federal Court to enquire into the reasons of the refusal against which no appeal lies to the Federal Court. Once such a certificate has been granted, any party in the case may appeal to the Federal Court on the ground that the question involved regarding the interpretation of the Constitution Act has been wrongly decided or on any grounds on which appeals lie to His Majesty in Council or, with the special leave of the Federal Court, on any other ground. Once such a certificate has been granted no direct appeal lies to His Majesty in Council. When the High Court grants the necessary certificate, it is not essential that one of the grounds of appeal must be that the question of law regarding the interpretation of the constitution has been wrongly decided. In fact this may even be ignored. In A I R 1940

F C 5¹ and A I R 1940 F C 10² it has been recently held by the Federal Court that when jurisdiction to hear an appeal is once vested in the Court, it cannot be divested by any subsequent events. "A certificate," to quote their Lordships of the Federal Court, is the key which unlocks the door into this Court and a litigant who has once passed through that door cannot afterwards be ejected by happening of events outside and beyond his control.

It has also been held in A I R 1939 F C 43³ that appeals also lie to the Federal Court in criminal cases provided the necessary certificate is given by the High Court concerned. In the case of appeals from the High Courts of a Federated State, such appeals shall lie to the Federal Court on the ground that a question of law which concerns the interpretation of the Constitution Act, or Order in Council or the Instrument of Accession of the State concerned or the agreement made with the State for the administration of Federal laws has been wrongly decided. The Federal Legislature is vested with power to enlarge the appellate jurisdiction of the Federal Court and abolish in whole or in part direct appeals in civil cases from British Indian High Courts to His Majesty in Council. A Bill for this purpose cannot be introduced in any Chamber of the Federal Legislature without the previous sanction of the Governor-General in his discretion. The Federal Court cannot sit as a Court of appeal from its own decisions nor can it entertain applications for review on the ground that one of the parties conceives himself to be aggrieved by the decision. The rules which govern the practice of the Judicial Committee and the House of Lords in matters of review govern the practice of the Federal Court. Consequently, no case can be re-heard in the Federal Court and an order once made is final and cannot be altered. As laid down in A I R 1941 F C 1,⁴ the Federal Court exercises its power of review only for the purpose of correcting mistakes which have been introduced through inadvertence.

Appeals from the judgments of the Federal Court given in the exercise of its original jurisdiction in any dispute which concerns

the interpretation of the Constitution Act, an Order in Council made thereunder, an Instrument of Accession of a Federated State or an agreement with a Federated State for the administration of a Federal subject, lie to His Majesty in Council without any leave. In all other cases such appeals lie to His Majesty in Council either by leave of the Federal Court or by that of His Majesty in Council. The Privy Council has recently ruled that it will give such leave only in substantial cases. All civil and judicial authorities throughout the Federation are bound to act in aid of the Federal Court. With respect to British India and the Federated States, the Federal Court has power to make any order for the purposes of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of any contempt of Court which a High Court in British India has power to make within its jurisdiction. With the approval of the Governor-General in his discretion, the Federal Court is empowered to make rules of Court for regulating the practice and procedure of the Court. The administrative expenses of the Federal Court are charged upon the revenues of the Federation and the Governor-General alone in his discretion determines the amount to be included in the Budget.

It is of interest to note that in this article references to the High Court of a Federated State do not necessarily connote the highest judicial Court in the State. Section 217 provides that such references shall be construed as references to any Court which His Majesty may, after communication with the Ruler of the State, declare to be a High Court for this purpose. Such a communication can only be sent to the ruler after he has subscribed to the Instrument of Accession and has joined the Federation. Federation is like a Hindu marriage which cannot be dissolved. If His Majesty declares the highest judicial Court of the State concerned to be a High Court for that particular State for the purposes of Chap. 1, part 9, Constitution Act, there is no difficulty. But His Majesty may declare a British Indian High Court or the High Court of another State to be the High Court for that Federated State and the Ruler whose High Court has been so declared may agree to it. This would only empower the Court so declared to perform the functions of a High Court for that particular Federated State, but this alone does not vest the Court

1. ('40) 27 AIR 1940 F C 5: 185 IC 804: ILR (1939) Kar F C 190, Brij Raj Kumari v. Subh Karan Das.

2. ('40) 27 A I R 1940 F C 10: 187 IC 612: I L R (1940) Kar F C 14, Surendra Prasad Narain Singh v. Gajadhar Prasad Sahu.

3. ('39) 26 A I R 1939 F C 43: 181 IC 317: 40 Cr L J 468: ILR (1939) Kar F C 132: ILR (1940) Lah 400, Horiram Singh v. Emperor.

4. ('41) 28 AIR 1941 F C 1: 191 IC 1, Pirthwihand Lal v. Sukhraj Rai.

so declared with jurisdiction over the Federated State unless the Ruler concerned vests it with such a jurisdiction. In the event of the Ruler failing to do so, the position becomes anomalous. The Court so declared has no jurisdiction over the Federated State and appeals from the highest judicial Court of the State cannot lie to the Federal Court even if the case involves a question regarding the interpretation of the Constitution Act. Perhaps the only way out of this difficulty is for the paramount power to put political pressure on the State concerned to vest the Court so declared with jurisdiction over the State.

The appealable decisions of the Indian High Courts are of two kinds under the present law. From one, appeals lie to the Federal Court and from the other to the Privy Council. The existence of a constitutional point and the grant of a certificate by the High Court to the effect that such a point is involved, constitute the line of demarcation. If such a point is involved, and a certificate to this effect is obtained from the High Court, the appeal must lie to the Federal Court even if the parties do not challenge the decision of the constitutional point by the High Court. This is anomalous and politicians in India have frequently pressed the necessity for the establishment of a Supreme Court in India. This point has also been discussed several times in the Central Legis-

lature during the last 18 years. The Government of India have now under consideration the question of the expansion of the appellate powers of the Federal Court and of vesting it with jurisdiction to hear appeals which now go to the Privy Council. Last year the Government of India circulated their proposals to the various High Courts and their bars for eliciting their opinions thereon. The proposal received overwhelming support from the various High Courts. It was opposed only by the Calcutta High Court. There is not the least doubt that if the sphere of the activities of the Federal Court is extended by vesting it with jurisdiction to hear all appeals which now lie to the Privy Council, it would not only be most welcomed by the Indian public but would also enhance the prestige of the Federal Court. The same view was expressed by the Rt. Hon'ble Sir Tej Bahadur Sapru when the Constitution Act was in the making. He said that a purely Federal Court of three or four Judges would not be likely to carry much weight while a bigger Court of nine or twelve Judges would command confidence and attract talent. It is needless to say that the Indian States have little or nothing to do with the Supreme Court understood as a Court of appeal on non-federal matters. It would only be a substitute for the present Judicial Committee of the Privy Council.

REVIEWS

Principles and Forms of Pleading, by SURES CHANDRA GHOSH, M.A., B.L., *Bar-rister-at-law, Calcutta*. Copies can be had from Messrs. Eastern Law House, Ltd., Law Publishers & Law Book-Sellers, 15, College Square, Calcutta. Pages over 1500. Price Rs. 16.

In this book the author has dealt with the history, the principles and the forms of pleadings. He has explained as to who is entitled or liable to be sued, what causes of action may be joined, what reliefs may be claimed, what facts ought to be pleaded, etc., in particular cases. The rules of pleading contained in the Civil Procedure Code and the special rules contained in the Original Side Rules of the High Courts of Calcutta, Bombay, Madras and Rangoon and those of the Federal Court have been set forth in their proper places. The forms of pleading have been selected so as to cover a wide range of subjects. The plaints and defences

have been brought together under each group so that reference is made easy. We have great pleasure in recommending this book as a useful guide in the drafting of pleadings to the members of the legal profession, young or experienced. The printing and get up leave nothing to be desired.

The Indian Succession Act (2nd Edn.), by NRISINHADAS BASU, B.L., *Advocate, Calcutta*. Published by Messrs. Eastern Law House, Ltd., Law Publishers and Book-Sellers, 15 College Square, Calcutta. Pages over 1600. Price Rs. 12.

In this edition, the Commentary has not only been thoroughly revised but many portions have been re-written. Many new topics have been incorporated and latest amendments as well as English and Indian cases reported up to July 1940 have been noticed in their proper places. Several enactments which have some bearing on the

Succession Act and model forms of pleadings have been included in the Appendices. Thus, the book has been made as exhaustive and self-contained as possible. This edition also is sure to have the same good reception at the hands of the Bench and the Bar as the first edition. The printing and get-up are good.

The Law and Practice of Excess Profits Tax in India, by S. K. IYER, B.A., B.L., *Advocate, Madras*, and S. C. MANCHANDA, M.A. (CANTAB), *Barrister at-law*. Published by R. G. Sagar for Indian Law Agencies, Krishna Nagar, Lahore. Pages over 200. Price Rs. 5.

The authors have dealt with the law and practice of Excess Profits Tax in a critical and exhaustive manner. The principles have been explained under appropriate chapter headings with reference to the provisions of the Excess Profits Tax Act. The Act as amended up to date has been printed separately which facilitates reference. The rules issued under the Act and the forms prescribed and all other relevant matters have been usefully included in the Appendices. We are sure that this book will be of great use to the legal profession and the business people. The printing and get-up are good.

The Madras Agriculturists' Relief Act, by K. RAMASWAMI AYYANGAR, B.A., B.L., and M. NARASIMHA CHARI, B.A., B.L., B.Sc., *Advocates, Chittoor*. Copies can be had from M. Narasimha Chari, B.A., B.L., B.Sc., *Advocate, Chittoor*. Pages 94. Price Re. 1-4-0.

The Commentary to the sections of this

important Act has been written with reference to cases decided up to February 1941. The cases have been exhaustively discussed and the actual words from the judgment have been given to indicate the point decided and the reasons for the decision. A comparative table of the cases cited has been usefully given to facilitate reference. We are confident that this book will be found to be of great use to the Bench and the Bar in the Madras Presidency.

The Madras Criminal Cases Digest (1937-1940 Supplement). Compiled at the "Madras Criminal Cases Office," Nungambakam, Madras. Pages 118. Price Re. 1-8-0.

This is a digest of all criminal cases reported from 1937 to 1940 and serves as a supplement to the Madras Criminal Cases Digest, 1924 to 1936. The cases have been digested under proper headings and the Nominal Index, Table of Headings and parallel references have been usefully given. The price is quite moderate.

Penology in India.—Published by P. R. Bhatt for the Indian Publications, Ltd., Lalgir Chambers, Tamarind Lane, Fort, Bombay. The book can be had from the Sole Agents, the Popular Book Depot, Grant Road, Bombay 7. Pages over 200. Price Rs. 3.

This book is a record of the proceedings including the addresses delivered and the papers read at the First Indian Penal Reform Conference held in Bombay . . . The addresses and the papers are very interesting and instructive. We are sure the book will be read with great profit by people interested in penal reform in India.

The necessity for safeguarding and upholding constitutional, civil and religious liberties and the undesirability of vesting extensive powers in executive officers can be illustrated by three important cases. They are the Full Bench decisions of the Madras High Court in 6 Mad 203¹ and 51 Mad 1006,² and I L R (1939) Kar 751.³ Section 144, Criminal P. C., which vests extensive powers in the District Magistrate reads as follows :

Where in the opinion of a District Magistrate or certain other Magistrates there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable, such Magistrate may by a written order stating the material facts of the case direct any person to abstain from a certain act if such Magistrate considers that such direction is likely to prevent or tends to prevent danger to human life, health or safety or a disturbance of public tranquillity or a riot or an affray.

The effect of these Madras and Karachi decisions is to give very wide powers to Magistrates to interfere with civil liberties. It is only necessary for the Magistrate to say that he apprehends a disturbance of the public tranquillity or a riot or an affray to arm him with powers to suppress civil liberties and no Court can go into the question whether the opinion of the Magistrate is justified or not by the facts of the case. I will now give some illustrations to show to what absurd lengths these three decided cases can be stretched. A Hindu social reform league intends to hold a propaganda meeting to preach the desirability of introducing divorce in the Hindu law of marriage. The Sanatanists or any other section of the Hindu community have only to threaten a breach of the peace and make representations to the District Magistrate. And assuming that there was a genuine likelihood of breach of the peace, is the District Magistrate to be justified in passing an order under S. 144, Criminal P. C., prohibiting the meeting. Or to take another illustration if a section of the Muslims intend to organize a Pakistan meeting and the Hindus or any section of the Hindus threaten to break the peace, is the District Magistrate to be justified in prohibiting the Pakistan meeting. One more illustration would be sufficient to show to what absurdities we would be led to if the

1. ('83) 6 Mad 208 : 2 Weir 77 (FB), Sundram Chetti v. Queen.

2. ('28) 15 AIR 1928 Mad 1049 : 112 I O 863 : 80 Or L J 31 : 51 Mad 1006 : 55 M L J 442 (FB), Viswanatha Rao v. Emperor.

3. ('89) 26 AIR 1939 Sind 280 : 188 I O 641 : 40 Or L J 828 : ILR (1939) Kar 751, Pir Gul Hasan v. Emperor.

provisions of S. 144, Criminal P. C., are misapplied. Is a District Magistrate to be justified in prohibiting Church services if any section of the Muslim or Hindu community takes it into their heads to threaten a serious disturbance of public tranquillity or a riot. Further as the words in S. 144 are "in the opinion of a District Magistrate" the District Magistrate can act in an arbitrary manner and Courts cannot go into the question whether there were grounds for that opinion. In illus. 1 given above, a Sanatanist District Magistrate may prohibit the meeting to popularise divorce among Hindus whereas a reformist District Magistrate may not. The decisions in the Madras Full Bench cases and in I L R (1939) Kar 751³ rest on the ground that

the first duty of a Government is the preservation of life and property and to secure this power is conferred on its officers to interfere with even the ordinary rights of members of the community.

Sir Charles Turner C. J., at p. 220 observed that there is a distinction between rights which have a primary and rights which have a secondary claim to such protection as the Government can afford and where the Government cannot protect both classes of rights it may and it ought to abandon the latter to secure the former.

But this is with great respect a specious method of reasoning. Government is assumed to be capable of protecting all classes of civil rights and not merely some. A Government which can protect only some rights and not others is not in reality a Government but only an apology for a Government. In the Karachi case the learned District Magistrate addressed a letter to the Sub-divisional Magistrate asking for information as to the Muslim public opinion with regard to the holding of the Luari by the Pir of Luari—which was ultimately prohibited by an order under S. 144, Criminal P. C.—asking in particular whether orthodox Muslims consider the Luari Haji merely undesirable or definitely irreligious. The Sub-divisional Magistrate replied on the same day stating that Muslim public opinion was very much against the holding of the Luari Haji and that even liberal-minded Muslims considered this Haji as very objectionable from the religious point of view. The letter concluded thus :

The result therefore is that Muslims consider this Haj which is held at Luari instead of Mecca as 'batil' and definitely irreligious and they oppose it on the ground of the dictates of the Quaran more than on conventional grounds.

A few observations on this may be per-

mitted. It is difficult to see why the question whether Luari Haji is "undesirable or definitely irreligious" should have been the subject of a report. This case illustrates how Magistrates even with the best of intentions stray from the strict requirements of law. Even if the holding of Luari Haji is definitely undesirable and irreligious, it should be permitted in the same way as a Hindu social reformer's meeting on divorce. It would therefore be pardonable to assume that in coming to a decision whether there was a likelihood of breach of the peace the Sub-divisional Magistrate was influenced to some extent at least by considerations which should not have been considered, namely that the holding of Luari Haji was "definitely irreligious and opposed to the dictates of Quaran" to use the words of the Sub-divisional Magistrate himself. The concluding part of the report of the Sub-divisional Magistrate which has been quoted by Lobo J. in his judgment merely states that Muslims consider Luari Haji as definitely irreligious and that Muslims oppose it on the ground of the dictates of Quaran. There is nothing in it to justify that there was a likelihood of a disturbance of the public tranquillity or a riot or an affray and that the only way of avoiding it was to pass an order under Sec. 144, Criminal P. C., prohibiting the Luari Haji. Assuming that there was a likelihood of disturbance of the public tranquillity before an order can be passed under S. 144, Criminal P. C., prohibiting an act it must be shown that the only way of avoiding the breach of the peace would be by prohibiting the particular act. The special significance of the words "there is sufficient ground for proceeding under this section" which are found in S. 144, Criminal P. C., is not, it is submitted with the greatest respect, noticed in the Karachi decision.

The question of orders under S. 144, Criminal P. C., has also to be looked at from a different point of view. If the doing of an act is likely to lead to a breach of the peace by those opposing it the question whether the doing of the act is to be prohibited or the opposition to the doing of that act. If the act in question is a peaceful exercise of a civil or religious liberty it is only the opposition to the act that is to be prohibited and not the peaceful exercise of a civil or religious liberty. Of course it may not be possible for the District Magistrate to speedily determine whether the act is a civil right or a civil wrong. In such cases he would be justified in prohibiting the act

even if ultimately it turns out after an inquiry to be a civil right and not a civil wrong. In my view the significance of the words "sufficient ground for proceeding under this section" is that the District Magistrate has to be satisfied that the act is not a peaceful exercise of a civil or religious right or in the alternative that he has no time to decide that question. The District Magistrate has also to be satisfied that it is necessary to prohibit the doing of a particular act and not the opposition to it. The passing of an order under S. 144, Criminal P. C., implies a power on the part of Government to enforce obedience to that order. If Government can enforce obedience to an order under S. 144, Criminal P. C., it can equally well uphold constitutional, civil and religious rights. It will be dangerous to allow executive officers of Government to form the opinion that S. 144, Criminal P. C., allows Government officers to uphold only certain classes of rights and to suppress other classes of rights.

In 51 Mad 1006,² which followed the earlier Madras case it was observed that "where there is a conflict between the public interest and a private right, the former must prevail." But I may be pardoned for the remark that it is in the interests of the public that private rights should be upheld. Some recent decisions of the Madras High Court have expressed disagreement from the earlier Madras view. For instance 60 M L J 370.⁴ The view taken in 6 Mad 203,¹ 51 Mad 1006² and ILR (1939) Kar 751³ can only be supported on the ground that in the preservation of the public peace it may be necessary to override temporarily private rights. These words are taken from the Full Bench judgment in 51 Mad 1006.² But the real importance of these observations is not, I am afraid, grasped by executive officers of Government.

In my humble view if a person intends to do an act which is a peaceful exercise of a civil or religious right and gives sufficient notice to the District Magistrate, it would not be legal for the District Magistrate to pass an order under S. 144, Criminal P. C., directing him to abstain from the act. For, then having regard to the words "there is sufficient ground for proceeding under this section an immediate prevention or speedy remedy is desirable" in S. 144, Criminal P. C., it would not be legal for a District Magistrate to refuse to use the authority of Government to uphold

4. (81) 18 A I R 1931 Mad 242 : 181 I C 649 : 32 Cr L J 763 : 60 M L J 370, In re Sriramamurthy.

civil or religious rights and liberties. For similar reasons it would not be legal for a District Magistrate to repeat the prohibitory orders at regular annual or other periodic intervals. It is the duty of Government to govern and after the temporary emergency has passed the Government should arm itself with sufficient power to uphold civil rights. The significance of the words "it may be necessary for them to override temporarily private rights" is that private rights should not be overridden permanently by the repeated renewal of orders under S. 144, Criminal P. C.

This aspect of the matter does not appear to have been considered by executive authorities nor has it been noticed in any of the reported cases. Executive authorities are apt to form the impression that because High Courts have upheld the legality of an order passed by them under S. 144, Criminal P. C., interfering with the exercise of a private right they are given an implied license by the High Courts to renew the order under S. 144, Criminal P. C., from time to time whenever the exercise of the private right is again threatened. But this, it is

submitted, would not be a correct view. An order passed under S. 144, Criminal P. C., overriding a private right may be legal and justified by S. 144, Criminal P. C., when issued for the first time in a temporary emergency. But the passing of the same order for a second time may not be legal or justified by S. 144, Criminal P. C., if the authorities have sufficient notice of the intended exercise of private rights. What the Madras and Karachi High Courts have permitted is only a temporary interference with private rights. But it would be incorrect and dangerous to think that the decisions of these High Courts permit a permanent interference with private rights by the issue of periodical orders under S. 144, Criminal P. C., whenever the exercise of the private right is intended. If this be not the correct view then there would be a permanent premium on opposition to private civil rights and there would be an encouragement to those who wish to suppress all opposition to them. If the view suggested in this article does not meet with judicial approval then there is a clear case for action on the part of the Legislature to amend S. 144, Criminal P. C.

Joint Hindu Family and the Law of Insurance

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Life insurance is now-a-days considered as the potent weapon which can guarantee the economic security, which is absolutely essential for at least the continued existence and environments of life. It has been recognized as such in the progressive countries of the world. And it has not only proved its efficacy but has been greatly instrumental in helping the economic and industrial development of the country to a considerable extent. Life insurance is considered as very important and useful in a prosperous country like England and English people are now-a-days making strenuous efforts of carrying insurance to almost every cottage in the country. If it is considered of immense national importance in a country like England, it is much more important for a poor country like India where the death of the bread-earner is a great calamity particularly to those who have no life insurance to rely upon. At a small sacrifice one can guarantee economic security to his family or dependants against any danger, expected or unexpected which otherwise would cause utter ruin and starvation to them. Life insurance has taken such deep roots in countries like England, Germany

and United States that no man would be found whose income is above the maintenance or subsistence level that has not made a sufficient life insurance provision for himself and his dependants. It has been accepted as such a necessity by even Governments who go to the length of having compulsory life insurance for all Government employees. One certainly feels proud of Mysore which has, as is reported, introduced compulsory life insurance for all State servants.

The inconceivable poverty and unemployment which is eating into the vitals of millions can in a way be met with the help of life insurance being adopted by every Indian from the wage earner upwards. Further life insurance companies have been great assets, inasmuch as their huge reserves have helped great national industrial undertakings and thus have reduced unemployment to a certain extent. Moreover, through life insurance a great proportion of the wealth of the middle class remains as a saving which otherwise would be dissipated through speculation or uneconomic ventures. India affords an unlimited field for life insurance, and as such all honest and economically organized insurance concerns

have inconceivable prospects of success. If Government or as a matter of fact society was really keen on assuring economic security to all persons comprised in their fold, it could very well make life insurance compulsory for all of them. The various facilities and types of beneficial insurance policies, which can help everyone to be prepared to meet the monetary demands on their resources for the education and marriages of their children or even for their own maintenance when incapacitated, for their dependants or for their dependants after their demise can really be greatly helpful for all such contingencies. The contentment resulting from the assured income in itself would help persons to live happily and the larger the number of such contented families, the higher or nobler the life of that society or community.

In these anxious times it behoves every Indian to adopt life insurance as a means of social welfare for themselves and their comrades. Employers can enforce life insurance on their employees, a compulsory life policy at the time of marriage, at the birth of every child and such other moral compulsions will go a great way. Social institutions particularly the women's organizations can render immense social service by persuading people to go in for life insurance.

In the Hindu society the need of life insurance is all the more keenly felt. The Hindu society has itself changed considerably in its features and in its modes of life under the stress of modern economic and other world forces. The Hindu temperament no longer displays any special predilection for maintaining the solidarity of the joint family. A material out-look on life, an individual desire for self-advancement and a spirit of indifference to the welfare of others have sufficiently killed the spirit of family feeling, which once pervaded the Hindu society in all its aspects and have brought almost the disintegration of the family socially and economically. The Hindu joint family has therefore now lost its cohesion and by the process of partition or otherwise the individual is asserting his rights. The unit of society, it can be safely said is now the individual and not the joint family. Though the joint family may be said to have rendered useful service in the past by providing benefit to the old and infirm members of the family, similar to the old age pensions, or by providing insurance against illness making provision for marriage of boys and girls and for maintenance of widows in

the family, the institution is found to have survived its usefulness and is therefore fast disappearing. As the joint family is partly disappearing in the strict sense of the term the need for insurance by every member in the family now is much keenly felt, and it will not be wrong if it is claimed that everybody must insure his life before he goes in for marriage.

When the assured is a member of the joint family many complicated questions regarding the payment of insurance amount after his death arise. If the insurance money is considered as the joint family property then all the co-parceners in the family would have a share in it and the poor wife of the assured would not of course get full benefit. In order therefore to avoid all such complications after the death it is very strongly recommended that the member of the joint Hindu family who insures his life obviously for the benefit of his wife and children should take particular care to assign the policy in his life-time. If the policy is duly assigned the policy holder or (in his absence) the assignee only can claim the full benefit of the policy at the time of the maturity of the policy, (either by death or otherwise). Legal heirs of the policy holder other than the assignee can lay no claim to the claim amount in any way. Assignment can be effected any time and to any person after the policy is obtained by the policy holder. It is therefore always convenient and certainly less troublesome for the survivors, if the policy holders were to assign their policies to their legal heirs or to whomsoever they desire and not to rest satisfied with the mention only of the names of the beneficiaries in the proposal form or in the policy.

When an insurance is effected on the life of the person who is a member of the joint Hindu family and the premium is paid out of the joint family assets some apparent difficulty may arise in order to determine to whom the insurance money belongs, i. e., to say whether to the individual insured or to all the members of the joint family. One of the rules of the Hindu law is that property acquired with the aid of the joint family property becomes joint family property. Of course, when the premium is paid by the assured out of his separate property there can be no question that the money connected with the insurance is his separate property, 29 Mad 121,¹ and when there is any separate property, the presumption will be

1. ('06) 29 Mad 121, *Rajaram v. Ram krishnayya*.

that the insurance was secured by premium paid out of the separate property.

There is another reason why an insurance policy in the name and on the life of one of the members of the joint family cannot be considered as the joint property of all the members, that is, that the members of a joint Hindu family have no insurable interest in the life of one of them simply on account of their relationship. In this view a life insurance policy can in no case be considered as joint family property simply because the premium is paid out of joint family assets. But the member of the joint Hindu family will be held accountable for an unauthorized appropriation for the payment of premium of any part of the joint family property. The greatest interest which the other members of the joint family may claim in the policy in such a case would be a lien, to the extent of the interest of each individual member in the joint family assets, misappropriated by the policy-holder for the payment of premiums in order to keep the policy on foot.

As the question whether the insurance money is the joint family property or the separate property of the deceased is not yet finally settled the insurance companies always, when there is a dispute, ask the parties to produce the succession certificate from the competent Court. If the deceased was governed by the Mitakshara school of law and the sum assured can be considered to be part of the joint family assets the surviving co-parcener or co-parceners entitled to payment need not, it is submitted, take out a succession certificate. Nor will the surviving co-parcener in such a case be entitled to a succession certificate because it can only be granted to one claiming on succession and the co-parceners of the Mitakshara family claim by right of survivorship (36 ALL 380²). Where, however, the premia were paid out of the salary of the assured even if he was a member of the joint Hindu family, the insurance money is *prima facie* the self-acquired separate pro-

perty of the assured (13 M L J 75³). Subrahmaniam Ayyar C. J. and Sankaran Nair J., are of opinion that in a summary proceedings like the application for a succession certificate Courts should start with such an assumption the certificate should be issued to the next heir of the deceased, if he is the applicant, leaving any other party who sets up that it is joint property to establish it by a regular suit.

The latest case on the point is A I R 1932 Nag 162.⁴ Therein it is held that in the case of a joint family possessing joint family property, onus of proving that certain property is self-acquired and not joint property is upon the person asserting it. In the case of an insurance policy however that presumption would not hold good. A policy of life insurance is usually a personal contract between the person who is called the assured and the insurance company. It is true, no doubt that the insurance policy could be taken out for the benefit of the joint family, but the presumption would be against that as a rule and it must be proved that the policy was taken out with that intention and that premia were paid out of the joint family funds. In the absence of any proof to that effect, the correct presumption is that the policy was taken out as a personal policy for the benefit of the personal heirs of the assured. Relying upon this presumption the insurance companies, it is humbly submitted, should not ask the heirs of the deceased to produce succession certificates when it is doubtful whether the insurance money is separate property of the deceased or joint property of the family of which he was the member. That process involves considerable expense and a lot of time too. The companies should start with the presumption that the policy was taken out for the benefit of the personal heirs of the deceased and that it is in a way the separate property of the deceased. The persons who set up that it is joint property should be asked to establish their claim by a regular suit.

2. ('14) 1 AIR 1914 All 68; 24 IC 182; 36 All 380; 12 ALJ 525, Mathura Prasad v. Durga Dnyavate.

3. ('03) 13 M L J 75, Mahadeva v. Rama Narayana.

4. ('32) 19 A I R 1932 Nag 162; 141 IC 182, Sugandhabai v. Kesarbai.

Suit by the Original Plaintiff

by RAM KESHAV RANADE, B.A., LL.B., *Sub-Judge, Sangli.*

The questions for consideration may be stated as follows: A instituted a suit within limitation. Subsequently A assigned his interest to B, whose name was substituted

in place of A's upon an application of B to which A consented, admitting the execution and consideration of the assignment deed. Later on, it was found by the Court that

the assignment deed was void—say—it being in favour of a practising pleader and it was ordered by the Court under O. 1, R. 10 (part 2) that A's name should be substituted in place of B and the suit proceeded with. When this order was passed the time prescribed for the suit had elapsed. The following two questions crop up : (i) Whether A (original plaintiff) has any cause of action left in him to continue the suit? (ii) Is the suit barred by limitation in view of the provisions of S. 22, Limitation Act?

FIRST POINT REGARDING CAUSE OF ACTION

It is generally urged in such cases on behalf of the defendants that when the name of the assignee was substituted in place of the original plaintiff, the latter withdrew from the suit under O. 23, R. 1, Civil P. C.; that he has no cause of action left in him; and that he is precluded to conduct this suit, under O. 23, R. 1 and S. 12, Civil P. C. It is said that under S. 130, T. P. Act, the transfer of an actionable claim by the execution of an instrument in writing is complete and effectual upon the completion of the instrument; and that thereafter all the rights and remedies of the assignor vest in the assignee. It is therefore urged that the original plaintiff has no cause of action left in him. This argument is fallacious. Section 130, T. P. Act, presupposes a valid transfer; but in view of S. 136, T. P. Act, and S. 23, Contract Act, the assignment deed passed by the original plaintiff is altogether void. The result that follows is that no rights passed from the assignor to the assignee and that therefore the original plaintiff has undoubtedly a right to maintain a suit on the basis of the bond.

It is true that the rights of the transferor are transferred by the assignment to the transferee; but it is equally true that the transferor can maintain the action, and afterwards hand over the amount, when collected, to the transferee. The provisions of Chap. 8, T. P. Act, regarding transfers of actionable claims are intended to enable the transferees to maintain actions on the assignments, but there is nothing in the chapter which is intended to lay down that the assignor cannot himself maintain an action for the benefit of the assignee. The name of the assignee was substituted in place of the original plaintiff under O. 22, R. 10, Civil P. C., and under that rule, in cases of an assignment of any interest during the pendency of a suit the suit may, by leave of the Court, be continued by the person to whom such

interest has come. This rule gives the Court a discretion in allowing or refusing an application by the successors in interest to continue the litigation. The plaintiff who has instituted a litigation may prosecute it to its conclusion, notwithstanding a change of interest. The litigation will continue in his name for the benefit of his successors. By the provisions of O. 22, R. 10, Civil P. C., the successors in interest may get themselves substituted as plaintiffs. This is a provision not intending that after assignment and after consideration of the assignment deed being received, the original plaintiff has no cause of action left in him, but this is a provision against the danger that the original plaintiff, being no longer interested in the proceedings, may not vigorously prosecute them or may even collude with the adversary.

It cannot, therefore, be maintained that after the assignment deed and after the name of the assignee having been substituted in his place, the original plaintiff has no cause of action subsisting in him. The provisions of O. 23, R. 1 and S. 12, Civil P. C., have no application to the present suit. It is not that the original plaintiff has withdrawn without the requisite permission, the result of which would be that he would be precluded from instituting any fresh suit or any further suit in respect of the same cause of action. What he has done is that he withdrew from the suit in favour of the assignee. That is a withdrawal not as against the defendants, but as against the assignee. The provisions of O. 23, R. 1 contemplate a withdrawal by the plaintiff as against the defendants, but that being not the case here, those provisions cannot claim any application. When O. 23, R. 1 goes away, S. 12 which is invoked to help it, will follow suit.

For these reasons, it can be safely said that the original plaintiff has a cause of action subsisting in him to continue the suit and that he is not precluded by the provisions of the Civil Procedure Code to conduct the suit: *vide* A I R 1927 Mad 817,¹ A I R 1936 Pat 420² and AIR 1936 Oudh 275.³ In all cases of this type, it is generally hotly contended for the defendants that the original plaintiff has no cause of action left in him. At the outset it appears that since the original plaintiff has received consideration and

1. ('27) 14 AIR 1927 Mad 817 : 104 I O 409 : 58 MLJ 342, Chandra Shekara v. Naga Bhushanam.
2. ('36) 28 A I R 1936 Pat 420 : 163 I O 908 : 15 Pat 607 : 17 P L T 564, Jotilal v. Sheo Bhayan.
3. ('36) 28 AIR 1936 Oudh 275 : 162 I O 229 : 1936 O W N 414 : 12 Luck 150, Sitla Bux v. Mahabir.

passed an assignment deed, and since he has no personal interest in the suit, it can be legally maintained that he has no cause of action subsisting in him. In the light however of the reasoning and the case law given above, this contention will evaporate. Let us now pass on to the point of limitation which is comparatively more difficult than that of the cause of action.

BAR OF LIMITATION

This point hinges upon the construction of S. 22, Limitation Act. That section prescribes that where, after the institution of a suit, a new plaintiff or defendant is substituted or added, the suit shall, as regards him, be deemed to have been instituted when he was so made a party. Relying upon this section it is contended for the defendants that when the order for substitution of the original plaintiff in place of the assignee was made, the original plaintiff must be regarded as a "new" plaintiff and must be deemed to have instituted the suit on that day; and that as at that time the period of limitation had expired the suit must be barred by limitation. Before reaching any conclusion, it is better to advert to the case law bearing on this point. In AIR 1926 P O 88,⁴ the suit was instituted against the sons for compensation for a tort committed by their deceased father. The defendants were afterwards discharged from the plaint and the administrator of the estate of the deceased person was impleaded as a defendant instead. By a subsequent order the sons were again restored as defendants, in the view that the previous order striking out their names was wrong. Their Lordships of the Privy Council held that the suit as against the sons must be deemed to be instituted on the date of their reinstatement.

This is a Privy Council case and relying upon it, it can be argued for the defendants that in the present case the original plaintiff himself had filed this suit; but after the assignment, the name of the assignee was substituted in his place, and he was discharged. The assignment deed having however been found to be void, a subsequent order was passed striking out the name of the assignee and reinstating the original plaintiff. In these circumstances the suit must be deemed to be instituted on the date when the plaintiff's name was restored. In AIR 1931 Bom 590⁵ defendants 3,

4. ('26) 18 A I R 1926 P O 88 : 96 I O 887 (P O), *Havali Shaha v. Shaik Painda Khan*.

5. ('31) 18 A I R 1931 Bom 590 : 135 I O 423 : 83 Bom L R 1935, *Bishamberdas v. Brij Lal*.

4 and 5 were originally on the record, but afterwards their names were struck out. Later on their names were again added. It was held that the suit as regards them must be deemed under S. 22, Limitation Act, to have been instituted when they were brought on record. The principle underlying this decision appears to be that when a party originally impleaded is struck out and is again joined a second time, he is a new party within the meaning of S. 22, and the suit as regards him attracts the application of that section.

These two cases, one from the Privy Council and the other from the Bombay High Court, refer to the addition or substitution of the defendants. Our present case being on the point of addition or substitution of the plaintiff, I may allude to 9 C W N 883.⁶ The facts of that case were as follows: A instituted a suit on the last date of limitation. On a subsequent date B's name was substituted in place of A's upon an application of B, to which A consented, stating that A had sold his interest to B. Later on, A and B both represented that the alleged sale was a fictitious transaction and prayed that A's name should be restored and B's struck out. In accordance with this prayer the Court made an order substituting the name of A in place of B. The point arose whether A was a new plaintiff within the meaning of S. 22, Limitation Act. The Calcutta High Court held that A was a new plaintiff under S. 22 and that the suit was therefore barred by limitation.

Relying upon these authorities, it can be strongly argued for the defendants that when the second substitution order was passed, the original plaintiff was a new plaintiff within the meaning of S. 22, Limitation Act; and that therefore the suit is obviously barred by limitation. As against this argument, it is generally contended for the original plaintiff that he cannot be called a 'new' plaintiff, since he was originally on record and since he himself filed the suit. For this contention, reliance is placed on several authorities which however refer to a joint Hindu family and to a benami transaction. These cases stand altogether on a different footing. A joint Hindu family manager sufficiently represents the family as a whole, and when he sues or is sued in the interests of the family, the other members are bound by the result of the

6. ('05) 9 C W N 883, *Ramjoy Nath Sarkar v. Shambhu Nath Shaha*.

action, wherein the manager was made a party. In such cases the addition of the other members does not amount to the addition of the new parties within the meaning of S. 22. So also a 'benamidar' sufficiently represents the real owner. Where a benamidar is a party in a suit, the fact that the real owner is impleaded after limitation is not fatal and the provisions of S. 22 do not come in his way. These are the well established principles of law and no authority need be cited therefor. But these principles, well established as they are, do not lend the slightest support to substantiate the argument advanced for the original plaintiff, and escape the fatal consequences of S. 22.

There is one case whereon reliance is usually placed on behalf of the plaintiff; that is 19 Bom 135.⁷ In that case the name of a plaintiff was first struck out by the pleader. Subsequently his name was restored on his own application, but the period of limitation prescribed for that suit had then elapsed. It was held that the pleader acted beyond his authority in striking out the name, and that the restoration of his name must relate back to the filing of the suit, which was 7. ('95) 19 Bom 135, *Kirparam v. Modia Dayalji*.

therefore not barred by limitation. The facts and circumstances of this case are different and the principle enunciated therein cannot aid the original plaintiff to prove his case and arrest the application of S. 22. The position, then, that we arrive at after going through the case law cited above amounts to this: When the name of the original plaintiff was substituted in place of the assignee under O. 1, R. 10 (Part 2), he (original plaintiff) was a "new" plaintiff within the meaning of S. 22, Limitation Act, and the suit must, as regards him, be deemed to have been instituted when he was so made a party. The period of limitation having then elapsed, this is tantamount to saying that the suit is barred by limitation. To several Judges and to numerous pleaders, this position may appear simply revolting; but from the case law as it stands, we have got to accept it, irrespective of any view of us to the contrary. We may await some other ruling from their Lordships of the Privy Council, which may possibly give a turn to this revolting position. But till then, we have no other go but to dismiss the suit on the point of limitation, no matter if the suit relates to several lacs of rupees.

REVIEWS

Law College Magazine, Poona, Editor K. V. DIKSHIT, B.A., LL.B. Published by the Editor himself at the Law College, Poona. Subscription Rs. 2 per year or Re. 1 per issue.

We acknowledge with thanks the receipt of the February Part of the Magazine and are glad to note that it contains as usual, besides a record of the activities of the students in the college, several interesting articles, in English and in different vernaculars.

The Arbitration Act, By B. L. BHATIA, B.A. (HONS.), LL.B., Prem Villa, Lyallpur, Published by Puri Brothers, Law Booksellers & Publishers, Kachery Road, Lahore. Pages 170. Price Rs. 3.

This is another commentary on the Arbitration Act of 1940 which has amended and consolidated the law of arbitration in British India. The author has written the notes to the section in such a way as would be use-

ful both to the students of law and the legal profession. The notes are clear, comprehensive and precise. Principles of law have been stated with reference to case law both Indian and English and with suitable illustrations wherever necessary. The book would surely prove useful to the members of the Bar, the Bench and law students.

The Quinquennial Digest (1936-1940), by R. NARAYANASWAMI IYER, B.A., B.L., Advocate, Madras. Published by the Madras Law Journal Office, Mylapore, Madras. Columns 4184 (in Volumes I and II).

This is a Digest of all the Civil, Criminal and Revenue rulings reported in the years 1936 to 1940. The points are grouped under appropriate headings and sub-headings. The comparative reference to most of the journals are given. We are sure that this elegantly got up digest will be welcomed by the profession.

by GOVINDLAL D. SHAH, B.A., LL.B., Ahmedabad

(Author, 'The Payment of Wages Act').

Section 2 (vi), Payment of Wages Act (Act IV of 1936) defines "wages" as under :



(vi) "Wages" means all remuneration capable of being expressed in terms of money which would, if the terms of the contract of employment, express or implied, were fulfilled, be payable, whether conditionally upon the regular attendance, good work or conduct or other behaviour of the person employed, or otherwise, to a person employed in respect of his employment or of work done in such employment, and includes any bonus or other additional remuneration of the nature aforesaid which would be so payable and any sum payable to such person by reason of the termination of his employment, but does not include etc.

In a recent case, A I R 1941 Bom 26,¹ the High Court of Bombay has made the following observation in respect of that definition :

It has to be observed that under the opening words of S. 2 the definitions only apply if there is nothing repugnant in the subject or context. It seems to me that the word "wages" as used in most, at any rate, of the sections of the Act, plainly does not mean potential wages, but wages earned. Section 5 for instance, provides that the wages of every person employed shall be paid before a particular date. That must clearly mean wages earned, though curiously enough in sub-s. (2) the expression "wages earned" is actually used in connexion with wages of men whose employment has been terminated. Section 7, which is the section under which it is suggested that the bonus cannot be deducted because it forms part of the wages, in my opinion, plainly refers to wages earned. It says "... the wages of an employed person shall

be paid to him without deduction of any kind." That cannot mean that wages which may be earned, but have not been earned, shall be paid without deductions. The expression "wages" there must mean "wages earned".... In my opinion taking the definition in conjunction with the rest of the Act, it does not embrace potential wages. The expression "remuneration, which would, if the terms of the contract were fulfilled be payable" seems to me to mean no more than "remuneration payable on the fulfilment of the contract."

These remarks of the learned Judges of the Bombay High Court resolve themselves into the following propositions: (1) The expression, "remuneration, which would, if the terms of the contract of employment were fulfilled be payable" occurring in S. 2 (vi) means no more than "remuneration payable on the fulfilment of the contract." (2) Definitions only apply if there is nothing repugnant in the subject or context. (3) The word "wages", as used in most of the sections, does not mean "potential wages" but means "wages earned." (4) The provision in S. 7 that "the wages of an employed person shall be paid to him without deduction of any kind" has reference only to "wages earned."

In my humble opinion, proposition No. (1), bereft of its supposed implication, is an interpretation which is wholly in accordance with the plan and the purpose of the Act. However, in my humble submission that interpretation leads us only to the proposition that "wages" as defined in the Act

includes "remuneration payable on the fulfilment of the contract" and as such the term "wages" embraces all that would be payable under the contract of employment. For the purposes of this definition, the fulfilment or non-fulfilment of the terms is immaterial and all that the definition seeks to ascertain is whether it is 'payable' or not. "Payability" and not "actuality" is thus the test for determining whether a certain amount can be included in "wages." The definition therefore clearly means "potential wages" and not "wages earned." The words "all remuneration" indicate the intention of the Legislature to make the definition all inclusive. The learned Judges of the Bombay High Court have recognized the force of these arguments in the following observations in the same case :

The argument on behalf of the respondent is that 'wages' under the definition (in S. 2 (vi) of Act IV of 1936) means potential wages, and not actual wages ; that the words "all remuneration which would, if the terms of the contract of employment were fulfilled, be payable" include in wages sums capable of being earned under the contract ; and that in as much as every workman might earn the bonus, the bonus forms part of the wages of all the

1. ('41) 28 A I R 1941 Bom 26 : 192 I C 528 : 42 Bom LR 955, Arvind Mills Ltd. v. K. R. Gadgil. 1941 J/7 & 8

workmen. That argument appealed to both the lower Courts, who took the view that "wages" as defined were not wages actually earned but wages capable of being earned. No doubt on the language of the definition there is something to be said for that view.

I have discussed and advocated this interpretation at p. 108 of my book*; and my respectful submission is that in stating proposition No. (1) the learned Judges of the Bombay High Court have also accepted the argument that appealed (to me and) to both the lower Courts; and if they do not accept the interpretation in a particular section or context, though not bound to do so, they may give some guidance for rejecting the meaning attached to the word "wages" by the Legislature. In my humble submission, in enunciating the rest of the propositions they must clearly be recognized to be going against the expressed intention of the Legislature, and they may as well have stated the reasons and the compelling necessity for doing so.

I think it is necessary to indicate here that having defined wages in this all inclusive manner the Legislature has by enacting S. 7 (1) provided that these potential wages shall be paid without deductions of any kind except those provided by the Act. As the Legislature thus stipulated for payment of potential wages provision has been made for deductions of sums which in equity and justice employees cannot be entitled to receive. That the Legislature has placed limitations on the extent of these deductions is another matter, but no deduction from potential wages is legal unless it is under one of the provisions of S. 7 (2). The Legislature has thus overridden the contract in the matter of deductions from potential wages and this is so even in cases of express contracts made before the commencement of this Act: *vide* S. 23. Once this cardinal fact is grasped there will be no confusion between what are 'wages' under the Act and what are 'wages' to be paid to an employee after deductions permitted under S. 7 (2).

In stating proposition No. (2) the learned Judges have referred only to the judicial discretion given to Courts of law in the matter of interpretation and application of any enactment. The proposition ought, however, to be in the form that definitions do not apply only if there is anything repugnant in the subject or context and that such

repugnancy must irresistibly and irrebuttably be established. If the meaning or interpretation of a certain word or phrase is laid down by the Legislature, a Court of law should certainly be slow in discarding that interpretation, and rather, as observed in A I R 1928 Lah 325² "it is that meaning and that meaning alone which must be given to it." Again the following observations in A I R 1927 Mad 85³ deserve good consideration.

When a phrase or word or expression in an enactment is explained by the Legislature, the Act has to be applied with the authoritative explanation, for the very object of the authoritative explanation is to enable the Court to understand the Act in the light of the explanation.

While the following very weighty words of the Privy Council in A I R 1920 P C 114,⁴ should serve as a caution against rejecting the definition in an interpretation clause too lightly :

When the interpretation clause in a statute says that such and such an expression shall include so and so, a Court in construing a statute is bound to give effect to the direction unless it can be shown that the context of the particular passage where the expression is used shows clearly that the meaning is not in this place to be given effect to, or unless there can be alleged some general reasons of weight why the interpretation clause is to be denied its application. It is obvious that there is nothing to be found in the context of S. 50 (of Act 25 of 1891 of Natal) which would fulfil the first stated requirement. It is accordingly on general considerations that the majority of the Supreme Court have based their judgments It is a novel and, to their Lordships, unheard of idea that an interpretation clause which might easily have been so expressed as to cover certain sections and not to cover others should be, when expressed in general terms, divided up by a sort of theory of *applicando singula singulis*, so as not to apply to sections whose context suggests no difficulty in its application.

It will thus be seen that proposition No. (2) ought to fix the burden of showing the repugnancy on the party seeking to depart from the meaning attached to a word or phrase by the definition clause. The general words at the opening of the section are not a charter to the Courts to reject lightly the meaning attached by a definition clause. It is a little difficult to understand why the learned Judges of the Bombay High Court propound proposition No. (3) when in their own view on the language of the definition there is something to be said for the other view and when they have not shown why they reject that other view. It

2. ('28) 15 AIR 1928 Lah 325: 110 I C 164: 9 Lah 649: 29 P L R 733, *Dial Singh v. Gurdwara Sri Akal Takht Amritsar*.

3. ('27) 14 AIR 1927 Mad 85: 99 I C 143: 51 M L J 641, *Balaji Singh v. Chakka Gangamma*.

4. ('20) 7 A I R 1920 P C 114 (P C), *Indian Immigration Trust Board of Natal v. Govindaswami*.

* Available either from the Author at Shantiniketan Society, Ellis Bridge, Ahmedabad or from the publishers Messrs. N. M. Tripathi & Co., Princess St., Bombay. 1941 Edition is now in preparation and will be available at Rs. 3 per copy, postage extra.

is one thing to say that the definition of 'wages' in the Act means 'wages earned,' and quite another to say that in most of the sections it means 'wages earned,' and, as we have already seen, the learned Judges of the Bombay High Court do not assert the former interpretation but only offer the latter. It is in itself an admission that their interpretation makes an artificial division of the sections and in some only of these sections the meaning offered by them is to apply. In my humble submission, once the interpretation of the definition has been made it must be adhered to unless in each section in which it is to be avoided it is irresistibly shown that that meaning cannot be accepted. It has been observed in A I R 1936 Cal 331⁵ that

it is a well established canon of construction that the same word used in different parts of the same statute must have the same meaning, unless something to the contrary appears from the context, and so long as the definition declares that certain words and expressions used in the Act have certain meaning it cannot be within the province of a Court of law to declare that it shall generally have a different meaning in respect of several sections. The general statement contained in proposition No. (3) is, therefore, against all canons and principles and should not be followed unless supported by reasons of weight in respect of each section. In my humble and respectful submission, the meaning attached to the word 'wages' by the definition clause is applicable to all the sections without any exception. It is only in S. 5 (2) of the Act that the Legislature has found it necessary to depart from the meaning declared in the definition clause, and it has made its intention clear by using the expression 'wages earned'. There need be no difficulty in appreciating the reason for this departure, because it is clear that computation of all remuneration included in the definition of wages may take some time and the Legislature has enacted that even if that be so, 'wages earned,' which may mean 'wages earned under the contract,' shall, in any case, be paid off immediately upon dismissal by an employer. It will thus be seen that the use of the word 'earned' is deli-

berate and by implication it negatives the argument that 'wages' in other sections means 'wages earned.' If that were not so, there was no necessity for singling out S. 5 (2) for the use of expression 'wages earned.' To suggest that it is a slip or inconsistency is to beg the question and does unnecessary injustice to the framers of the Act.

Coming to the last proposition, I find that the interpretation accepted by the learned Judges will lead to curious results. It means that wages become payable under the Payment of Wages Act only when they are payable under the contract and, if that is so, there is nothing in the Act to prevent the freedom of contract of an employer. Section 23 prevents any contracting out of the rights conferred by the Act, but there are no rights conferred by the Act unless we read them in S. 7 (1). In my humble and respectful submission, the term 'wages' in S. 7 (1), at any rate, means 'potential wages' and any other interpretation will render the Act nugatory. If it does not mean 'potential wages' there is no necessity for S. 7 (2) (b) and S. 9 because a person remaining absent from duty cannot be said to have earned his wages and these provisions must be held to be superfluous. It is a well recognized canon of interpretation that law must be interpreted in a way which will not render one of its provisions entirely nugatory: A I R 1938 Nag 180.⁶

In this connexion a reference may also be made to the report of the Select Committee on cls. (2) and (7) of the Bill. On the other hand, if the term 'wages' means 'wages payable on the fulfilment of the contract,' the contract will supersede the provisions of the Act and sums of money will be withheld by an employer as 'not earned' when in fact they would be unlawful deductions. An employer will thus impose fancy conditions before an employee can legally 'earn' his wages and it will be possible to circumvent the provisions of the Act with impunity. This interpretation will thus make the Act a dead letter and it is therefore necessary to make an immediate legislative amendment in the Act to prevent such frustration of these provisions.

5. ('36) 23 AIR 1936 Cal 331 : 166 I O 448, Sripati Charan De v. Kailash Chandra Jana.

6. ('38) 25 A I R 1938 Nag 180; 174 I O 374; 1 L R (1940) Nag 441, Ram Prasad Jagbandhoo v. Anandi Brindawan.

A. I. R. 1940 All 263 (FB)

by VAIKUNTHLAL MAGANLAL THAKKAR, *Pleader, Deodar.*

In AIR 1940 ALL 263¹ it was held by the Allahabad High Court that S. 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P. C. The grounds of the decision are given in the judgment. Further grounds supporting the decision can also be found in A I R 1940 Lah 129.² The Legislature of the United Provinces thought that the interpretation of S. 162, Criminal P. C., was wrong and added the words "or to affect the provisions of S. 27 of that Act" at the end of sub-s. (2) of S. 162 by Act 9 of 1940, and thus the Act apparently negatives the effect of the Full Bench decision. Criminal procedure appears in the Concurrent Legislative List in Sch. 7, Government of India Act, 1935. Therefore, both the Provincial and the Central Legislatures have power to enact laws on the subject; hence the Provincial Legislature has power to enact laws on the criminal procedure subject to the provisions of S. 107, Government of India Act. That section enacts that :

If any provision of a Provincial law is repugnant to any provision of an existing Indian law with respect to one of the matters enumerated in the Concurrent Legislative List then . . . the existing Indian law shall prevail and the Provincial law shall, to the extent of the repugnancy, be void.

The question that now arises for consideration is "whether the provisions of Act 9 of 1940 of the United Provinces are repugnant to the provisions of S. 162, Criminal P. C., (an existing Indian law)? It has been held by the Allahabad and Lahore High Courts in A I R 1940 ALL 263¹ and A I R 1940 Lah 129,² respectively, that the provisions of S. 162,

Criminal P. C., are specific provisions to the contrary within the meaning of S. 1 (2) of the Code and that S. 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P. C. Thus, so far as these two provisions are concerned, it has been authoritatively laid down that the intention of the Legislature is that S. 27, Evidence Act, is pro tanto repealed by S. 162, Criminal P. C. If the Legislature thought that the Evidence Act is a special law and S. 162, Criminal P. C., is not a specific provision to the contrary within the meaning of S. 1 (2) of the Code and would not be affected by the Criminal Procedure Code, there was no necessity to exclude S. 32, cl. (1), Evidence Act, from the operation of S. 162 of the Code. Thus, while enacting the section the Legislature clearly took the view that S. 162 of the Code was a specific provision to the contrary within the meaning of S. 1 (2) of the Code and would affect the Evidence Act also. Thus, Act 9 of 1940 is repugnant to the clear words of S. 162, Criminal P. C. The Indian law did not except S. 27, Evidence Act, from the operation of S. 162 and hence Act 9 of 1940 of the United Provinces is repugnant to S. 162, Criminal P. C., (an existing Indian law) in so far as it adds the words "or to affect the provisions of S. 27 of that Act;" and it is void to that extent under S. 107, Government of India Act, 1935. Therefore, my humble submission is that the Full Bench decision in A I R 1940 ALL 263¹ is not affected by Act 9 of 1940 of the United Provinces, and it holds good in spite of the passing of that Act, unless and until the Act is assented to by the Governor-General of India. I invite more learned and eminent lawyers to deliberate and solve the problem so that it may be useful to the Bench and the Bar.

1. ('40) 27 A I R 1940 All 263 : 188 I C 562 : 41 Cr L J 627 : ILR (1940) All 896 : 1940 A L J 241 (F B), Baldeo v. Emperor.

2. ('40) 27 A I R 1940 Lah 129 : 188 I C 498 : 41 Cr L J 591 : I L R (1940) Lah 242 (F B), Hakam Khuda Yar v. Emperor.

A Note on Section 162 of the Criminal Procedure Code

by KRISHNA KUMAR BOSE, M. A., B. L., *Pleader, Sambalpur (Orissa).*

Ever since the provisions of S. 162, Criminal P. C., were amended by Act 18 of 1923, three principal difficulties have arisen in the construction of the section. First, whether S. 162 excludes only statements reduced into writing, or all statements to a police-officer, oral or written. Secondly, whether the words "any person" in para. 1 of the section mean only persons examined as witnesses by the police in the course of

investigation, or include also an accused person. Thirdly, whether the section in its present form affects in such a way as to virtually repeal the provisions of S. 27, Evidence Act, 1872. The object of the present article is to trace through important rulings and the arguments followed therein how the matters have been discussed in various ways in the different High Courts, to what extent the difficulties have been solved, and

whether any question still remains to be finally decided so as to clarify the legal position. The earliest decision on the first point appears to be that of the High Court of Bombay in A I R 1924 Bom 510,¹ which seems to have been of the opinion that the amended S. 162 applied not merely to statements reduced into writing but also to oral statements. This is apparent from a passage in the judgment of Fawcett J., which runs as follows :

It is quite clear that under S. 162, Criminal P. C., as substituted by the Code of Criminal Procedure Amendment Act of 1923, it is not now permissible for statements to the police, whether oral or written, to be put in evidence, in order to corroborate a prosecution witness, or to contradict a defence witness . . .

In A I R 1925 Mad 579,² however, it was held that the application of the new S. 162 was confined, as that of the old one was, to the written record. Wallace J. observed that the new section was designed to confer on an accused person a legal right, which the old section did not give, of having a copy of such written statement for the purpose of using it to contradict the witness, and that, as regards proof and use of oral statements, the law is unaltered and is as it was before. All oral statements which were previously admissible under the Evidence Act, the use of which was not prohibited by the Criminal Procedure Code, are still admissible and may be used.

The Madras view was however dissented from in a Full Bench decision of the Rangoon High Court, reported in AIR 1926 Rang 116,³ which discussed the Bombay case referred to above as also two Patna and two Lahore rulings : AIR 1925 Pat 450,⁴ AIR 1926 Pat 232,⁵ A I R 1925 Lah 337⁶ and A I R 1925 Lah 399.⁷ Rutledge C. J. while construing the section so as to exclude oral statements makes the following observations :

It is urged that this construction may bear hardly upon an accused and may deprive him of the only method of showing the untrustworthiness

1. ('24) 11 AIR 1924 Bom 510 : 83 I C 1007 : 26 Cr L J 223 : 26 Bom L R 965, Emperor v. Vithu Balu.

2. ('25) 12 AIR 1925 Mad 579 : 86 I C 209 : 26 Cr L J 721 : 48 Mad 640 : 48 M L J 195, Venkatasubbiah v. Emperor.

3. ('26) 13 A I R 1926 Rang 116 : 96 I C 145 : 27 Cr L J 881 : 4 Rang 72 (F B), Emperor v. Nga Tha Din.

4. ('25) 12 A I R 1925 Pat 450 : 93 I C 988 : 27 Cr L J 524 : 4 Pat 204, Guhi Mian v. Emperor.

5. ('26) 13 A I R 1926 Pat 232 : 93 I C 884 : 5 Pat 68 : 27 Cr L J 484 : 7 P L T 896, Jagwa Dhanuk v. Emperor.

6. ('25) 12 A I R 1925 Lah 337 : 88 I C 513 : 26 Cr L J 1153 : 6 Lah 24 : 26 P L R 139, Labh Singh v. Emperor.

7. ('25) 12 A I R 1925 Lah 399 : 93 I C 280 : 27 Cr L J 438 : 6 Lah 171 : 26 P L R 304, Rakha v. Emperor.

of the witnesses for the prosecution by eliciting in cross-examination that they had made statements to the police inconsistent with their evidence in Court. I admit that in many cases this may be so. Such hardship or such inconvenience is a question for the Legislature and not for us. In the view which I have taken of the proper meaning of this sub-section, I am fortified by a decision of the Bench of the High Court of Bombay in A I R 1924 Bom 510.¹ . . . The same view seems to have been held by a Bench of the Punjab High Court in AIR 1925 Lah 337⁶ though the matter was not discussed. The question is however discussed at some length in A I R 1925 Lah 399.⁷ There the learned Chief Justice, after discussing the effects of the section, says: 'The result is that not only is the record of the statement of a witness taken under S. 161, Criminal P. C., excluded from evidence, but also the proof of such statements by oral evidence for the purpose of corroborating the testimony of the witness for the prosecution.' In A I R 1925 Pat 450⁴ Adami J. is of opinion 'that the provisions of S. 162 do not prevent the prosecution, after a witness has made a statement, asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence from asking the Sub-Inspector whether in fact the witness had made that statement to him. In doing this there is no use of the statements recorded by the police during their investigation.' I am unable to agree with this restriction put upon the meaning of the words 'used for any purpose.' In the judgment of Mullick J. in A I R 1926 Pat 232,⁵ he says : 'I think it must be admitted that S. 162, Criminal P. C. of 1923, has altered the previous law so as to completely exclude statements made by witnesses during the course of an investigation, except for certain limited purposes not here material.' It is true that the learned Judge does not differentiate between written and oral statements; but his opinion seems to embrace both. The only decision to the contrary is . . . A I R 1925 Mad 579² . . . with which I am unable to agree.

The argument followed by Rutledge J. in the above case was that if the words "any such statement" were to be confined to written statements there would seem to be no object in adding "or any record thereof." In his Lordship's view, the point could be understood clearly enough on a comparative study of the amended section with the sub-section of the Code of 1898. In the earlier Code the words used were "nor shall any such writing be used as evidence," whereas in the amended Code the sub-section reads "nor shall any such statement or any record thereof . . . be used for any purpose . . ." If only written statements were aimed at, why should the Legislature drop the words "such writing?" It was also observed by his Lordship that after all a statement reduced to writing might be presumed to be more accurate and reliable than one which remained oral. If it was the intention of the Legislature to exclude written statements except for one narrow definite purpose, it cannot with any reason be presumed that

the Legislature intended to leave the less reliable oral statements admissible without any safeguard or limitation.

Thus already in 1926 four High Courts were agreed that the new S. 162 excluded from evidence both oral and written statements made to a police officer in course of investigation. The Madras High Court only held a contrary view. The Madras view however was subsequently overruled in a Full Bench decision reported in A I R 1928 Mad 1028,⁸ where, following very much the same reasoning as that adopted by Rutledge C. J. in A I R 1926 Rang 116,³ it was held that the words 'shall any such statement . . . be used' in para. 1 of the section apply both to oral and written statements.

As the other High Courts also seem to hold the same view, it may now be safely said that there remains no longer any conflict of opinion on this topic after the two Full Bench rulings of the High Courts of Madras and Rangoon. Passing on to the second point, namely whether the words "any person" in S. 162 include an accused person it is well to begin with the case in A I R 1927 Cal 17⁹ where three previously decided cases of the High Courts of Patna, Lahore and Rangoon have been discussed and approved. There Rankin J. remarks :

Now the effect of S. 162, Criminal P. C., as amended in 1923, has been the subject of much doubt and this is creating difficulty in the conduct of trials. There are unreported cases of this Court in which S. 162 has apparently been assumed to apply to statements made by the accused. I find, however, that in the High Courts of Patna, Lahore and Rangoon it has been held that statements by accused are not within the section : AIR 1926 Rang 116,³ AIR 1926 Lah 88¹⁰ and AIR 1926 Pat 232.⁵ The first of these cases was decided by a Full Bench and the judgments including the dissenting judgment of Heald J. deal very fully with the arguments pro and con.

In my opinion these decisions are right and should be followed in this Court. In this Court it is settled law that in spite of the generality of the language of S. 161 of the Code that section does not apply to an accused. Both the context of S. 162 and its contents point in the same direction. "Any person" means "*quivis ex populo*", (i. e., anyone you like out of the people). It is unreasonable in view of the special law applicable to the statements of accused persons to the police to refuse to apply the well established rule "*generalia specialibus non derogant*". A contrary view involves an implied but complete repeal of S. 27, Evidence Act.

8. ('28) 15 A I R 1928 Mad 1028: 112 I C 682 : 29 Cr L J 1098 : 51 Mad 967 : 55 M L J 351 (F B), Chinna Thimmappa v. V. K. Timmappa.
9. ('27) 14 AIR 1927 Cal 17:99 IC 227:28 CrLJ 99: 54 Cal 237 : 44 C L J 253, Azimaddy v. Emperor.
10. ('26) 13 A I R 1926 Lah 88 : 94 I C 901 : 27 Cr L J 709 : 7 Lah 84 : 27 P L R 583, Rannun v. Emperor.

The above view was followed in 33 C W N 257¹¹ (a case decided in 1928) where it was held that S. 162, Criminal P. C., applied only to witnesses and not to an accused under trial. On the other hand, an earlier decision of the Court of the Judicial Commissioner, Nagpur, reported in A I R 1926 Nag 368,¹² held a contrary view. There it was laid down that :

The terms of S. 162, Criminal P. C., are perfectly clear, and no statement made to the police by "any person" whether accused or witness during an investigation can be even mentioned in evidence except to the extent and under the circumstances and conditions stated in that section.

A similar view was expressed in A I R 1927 Nag 203.¹³ The decision in AIR 1926 Nag 368¹² referred to above was, however, dissented from in A I R 1929 Nag 17¹⁴ where it was held that an accused person was not included within the meaning of the words "any person" in S. 162. The Court of the Judicial Commissioner at Sind also adopted as early as 1925 the view that "statement" in S. 162 refers to statement of witnesses rather than those of accused regarding whom an investigation is held : A I R 1925 Sind 237¹⁵ followed in A I R 1926 Sind 151.¹⁶ Thus the position in 1929 is this : The High Courts of Calcutta, Patna, Lahore and Rangoon, and the Courts of the Judicial Commissioners at Nagpur and Sind are of opinion that S. 162, Criminal P. C., applied only to witnesses examined by the police and not to persons accused of the offence under investigation. There is no reported case of any importance of the High Courts of Allahabad, Bombay and Madras, where this matter has been discussed. Only one Full Bench ruling of the Madras High Court, A I R 1928 Mad 1028,⁸ has accepted the view that the words "any person" include an accused person, though even there the point has not come directly in question. To all intents and purposes therefore the accepted law on the point in 1929 is that S. 162 is inapplicable to the statements of accused persons. In A I R 1931 Bom 311,¹⁷ however Beaumont C.J., held:

11. ('29) 118 I C 368 : 30 Cr L J 916 : 33 C W N 257, Newaj Ali v. Emperor.
12. ('26) 13 A I R 1926 Nag 368 : 95 I C 59 : 27 Cr L J 731, Dadi Lodhi v. Emperor.
13. ('27) 14 A I R 1927 Nag 203 : 100 I C 820: 28 Cr L J 340, Bhagia v. Emperor.
14. ('29) 16 A I R 1929 Nag 17 : 114 I C 273 : 30 Cr L J 258:24 N L R 158 (FB), Gola v. Emperor.
15. ('25) 12 A I R 1925 Sind 237 : 86 I C 410 : 26 CrLJ 778: 19 SLR 142, Umer Duraz v. Emperor.
16. ('26) 13 A I R 1926 Sind 151 : 93 I C 248 : 27 CrLJ 456 : 20 SLR 74, Hussain Bibi v. Emperor.
17. ('31) 18 A I R 1931 Bom 311 : 133 IC 748 : 32 Cr L J 1077 : 55 Bom 435 : 33 Bom L R 305, Issuf Mahomed v. Emperor.

Section 162 was intended to prevent the user of statements made by the accused to the police, and questions designed to show, by process of elimination, that matters subsequently mentioned by the accused were omitted from such statements are within the mischief aimed at by the section.

In A I R 1931 Mad 779¹⁸ also the cases in A I R 1927 Cal 17,⁹ A I R 1926 Rang 116,³ A I R 1926 Lah 88¹⁰ and A I R 1926 Pat 232⁵ mentioned above, were dissented from, and it was held that S. 162 was explicit and applied to accused persons as well. The words "any person" are wide enough to comprehend a person who subsequently becomes the accused. In his judgment, Jackson J. observes as follows :

The Court's sole function is to interpret the language which the Legislature has employed. As pointed out by Heald J., (4 Rang 72³ at p. 84) very probably the intention and the language do not coincide, but the Courts are only concerned with the language. Rankin C. J., in 44 O L J 253⁹ at p. 257, accepts this position and interprets "any person" in S. 162 as meaning '*quivis ex populo*.' But it is not very clear why "any one you like out of the people" is a phrase which excludes an accused person.

His Lordship continues :

There is however authority that S. 162 does not apply to accused persons : 7 Lah 84¹⁰ approved in 44 O L J 253.⁹ When that authority is analysed it is found to be based not so much on the plain reading of S. 162, as upon a dislike of what that plain reading involves. Speaking for myself I find no difficulty in the reading because the language seems to be perfectly plain; and I cannot see that any good object is served by the judiciary attempting to re-adjust the artificial barriers which the Legislature has erected in the way of evidence. If the Legislature chooses to lay down that any statement recorded by a police officer in the course of his investigation is worthless, save as provided by S. 27, Evidence Act, the Court must treat it as statutorily worthless, though judicially it may amount to evidence of the greatest value.

Heald J. in his dissenting judgment, in A I R 1926 Rang 116,³ had arrived at the same conclusion observing :

It is clear that the actual wording of the section makes no exception in respect of statements made by accused persons. The words "no statement made by any person" must include statements made by accused persons and there is, in my opinion, nothing in the section, as worded, to suggest that they ought to be read as if they were "any person other than accused person." I am of opinion therefore that the section as enacted must be read as including statements made by an accused person.

The Madras view was definitely settled in the Full Bench case in A I R 1932 Mad 391,¹⁹ in which the views expressed in A I R 1928 Mad 1028⁸ and A I R 1931 Mad 779¹⁸ were approved and it was held that the word "any"

is wide and general, and as such, the expression "any person" should include not only a witness, but also a person suspected or accused of an offence, who happens to make a statement to the police in the course of an investigation. Reilly J. while coming to the above conclusion, examined in detail the cases reported in A I R 1926 Pat 232,⁵ A I R 1926 Lah 88,¹⁰ A I R 1926 Rang 116³ and A I R 1927 Cal 17,⁹ and observed as follows :

It will be noticed that in these cases in the Patna, Lahore and Rangoon High Courts the interpretation of S. 162, Criminal P. C., was of interest mainly in regard to its effect on S. 27, Evidence Act. In A I R 1927 Cal 17⁹ a question arose directly whether the Sessions Judge was right in admitting in evidence statements outside the scope of S. 27, Evidence Act, which had been made by two of the accused to the police and were represented to have been made in the course of investigation. Rankin J. with whom Duval J. agreed, held that the decisions in A I R 1926 Pat 232,⁵ A I R 1926 Lah 88¹⁰ and A I R 1926 Rang 116³ were right, that S. 162, Criminal P. C., does not apply to accused persons and that statements made by an accused person to the police may be proved against him, if not admissible under the Evidence Act. There is no doubt about the conclusions of the learned Judge; but with great respect I may perhaps say that I find it difficult to follow his reasoning. He first mentions that in the Calcutta High Court it is settled that S. 161, Criminal P. C., does not apply to accused persons, quoting as authority for that statement 27 Cal 295²⁰ in which that point was not decided. I infer that there are other Calcutta cases to the effect mentioned. Next he remarks that both the context of S. 162 and its contents point in the same direction, with which I am unable to agree. The next sentence is "any person means *quivis ex populo*," which certainly points in the opposite direction. Then the learned Judge proceeds: 'It is unreasonable in view of the special law applicable to the statements of accused persons to the police to refuse to apply the well-established rule *generalia specialibus non derogant*. A contrary view involves an implied, but complete repeal of S. 27, Evidence Act.' That passage implies that the learned Judge is of opinion that S. 162 applies to accused persons, as otherwise there is no need to apply the rule to save the special provisions of S. 27, Evidence Act, from the general provisions of S. 162, Criminal P. C. But the final argument is again the other way, viz., that S. 162, having been amended in the interests of accused persons, cannot be held 'to deprive an accused of what so often is the mainstay of a good defence, the right to show that the moment he was challenged he gave the explanation on which he now relies.' This is the same argument as has been used by Mullick J. in A I R 1926 Pat 232.⁵ Rankin J. is sure that the section is intended to benefit accused persons; he recognizes that it deprives them of the right to prove that their witnesses made corroborative statements to the police, but he cannot believe that their own statements to the police which may be helpful to them have been shut out, forgetting that his interpretation exposes them to the risk of most damaging statements made by them to the police being

18. ('31) 18 A I R 1931 Mad 779 : 135 I O 864 : 33 O L J 132 : 62 M L J 71, Kalesha v. Emperor.

19. ('32) 19 A I R 1932 Mad 391 : 137 I O 9 : 33 O L J 418 : 55 Mad 908 : 62 M L J 742 (F B), Syamo Mahapatro v. Emperor.

20. ('93) 27 Cal 295 : 4 O W N 129, Queen-Empress v. Jadub Das.

proved against them, as would be the result in this case. If it were justifiable to let the balance of benefit or risk to the accused affect our interpretation of the section, I have no doubt it would be better for the accused to read the sentence in its plain meaning.

The learned Judge proceeds :

What appears more than anything else to have made learned Judges of other Courts reluctant to accept the plain interpretation of the section is the supposition that it would make S. 27, Evidence Act, of no effect. But as Ramesam J. has pointed out in AIR 1928 Mad 1058,⁸ the general rule that statements made by accused persons to the police in the course of an investigation cannot be proved does not affect the special exception to that rule remaining by force of S. 27, Evidence Act.

A point which arose in the interpretation of this section was whether in view of the fact that the marginal notes to Ss. 160 and 161, Criminal P. C., indicate that the words "any person" used in those sections refer to witnesses only, the same meaning was intended to be attached to the words "any person" in S. 162 which immediately follows. But, in the Madras case referred to above, extracts from which have been quoted at length, it was held that :

In construing a section the marginal notes should not be looked into, and cannot be a criterion for determining the meaning and scope of the section. This principle has been clearly laid down by their Lordships of the Privy Council in 26 All 393²¹ in the following passage :

'It is well settled that marginal notes to the section of an Act of Parliament cannot be referred to for the purpose of construing the Act. The contrary opinion originated in a mistake, and it has been exploded long ago. There seems to be no reason for giving the marginal notes in an Indian statute any greater authority than the marginal notes in an English Act of Parliament.'

That being so the use of the word 'witnesses' in the marginal notes of Ss. 160 and 161 should not be a guide for construing the wording of the sections themselves.

In spite of the decisions in AIR 1931 Bom 311¹⁷ and AIR 1932 Mad 391¹⁹ however, the other High Courts continued to hold the view that S. 162 was inapplicable to accused persons, as will be clear from the rulings given below. In AIR 1933 ALL 440²² it was held that: "It (i. e., S. 162) is not intended to include statements by accused persons," and in AIR 1934 Lah 695²³ the same view was expressed. As recently as 1938 it was held in the High Court of Patna, 19 P L T 432,²⁴ by Courtney-Terrell C. J. that :

21. ('04) 26 All 393 : 7 O O 248 : 31 I A 132 : 1 A L J 384 : 8 Sar 639 (P O), Balraj v. Jagatpal.

22. ('33) 20 AIR 1933 All 440 : 144 I C 1021 : 34 Cr L J 875 : 55 All 463 : 1933 A L J 1518, Emperor v. Faujdar.

23. ('34) 21 AIR 1934 Lah 695 : 155 I O 260 : 36 Cr L J 697 : 35 P L R 738, Muhammad v. Emperor.

24. ('37) 17 Pat 15 : 19 P L T 432, Pakala Narayanaswami v. Emperor.

Section 162, Criminal P. C., has no reference whatever to accused persons or to their statements, but merely codifies with certain modifications the law as to the use which may be made of previous statements which may have been made by witnesses.

Manohar Lall J. agreed with the learned Chief Justice and observed :

Section 162, Criminal P. C., is necessary corollary to Ss. 160 and 161, and must be read along with those two sections. It was never the intention of the Legislature that these three sections should apply to the case of an accused ; and these sections do not contemplate the case of an accused person whose attendance is to be secured as provided for in other sections of the Code dealing with the arrest of the accused or issuing summons or warrant to the accused. The question of admissibility of the statement of the accused is governed by the general provisions of the Evidence Act.

Thus, although the legal position was not definitely settled, the majority of the High Courts continued to hold that S. 162, Criminal P. C., did not apply to accused persons, until their Lordships of the Privy Council exploded that view in AIR 1939 P C 47,²⁵ reversing the decision in 19 P L T 432,²⁴ and held :

That the words in their ordinary meaning would include any person though he may thereafter be accused seems plain. Investigation into crime often includes the examination of a number of persons none of whom or all of whom may be suspected at the time. The first words of the section prohibiting the statement if recorded from being signed must apply to all the statements made at the time and must therefore apply to a statement made by a person possibly not then even suspected but eventually accused.

The decision in AIR 1939 P C 47²⁵ is now the law on the point and a question in respect of which there was a long-standing doubt has in that case been finally settled. It remains now to consider the third and most important topic, namely whether S. 162 in its present form virtually repeals S. 27, Evidence Act. At the outset it may be noted that prior to the Privy Council decision referred to above, the conflict between S. 162, Criminal P. C., and S. 27, Evidence Act, had often come under consideration in connexion with the determination of the questions whether S. 162, Criminal P. C., applied to both oral and written statements, and whether the words "any person" in that section included an accused person. But the subject had in most cases been treated only as a side issue and had not received the attention it deserves. That being so, one finds in different rulings six different ways of tackling the question :

25. ('39) 26 AIR 1939 P C 47 : 180 I C 1 : 40 Cr L J 364 : 18 Pat 234 : I L R (1939) Kar P C 123 : 66 I A 66 (P O), Pakala Narayan Swami v. Emperor.

(1) The first is to confine the applicability of S. 162, Criminal P. C., to the written record so that the two sections may not come into conflict: A I R 1925 Mad 579.² (2) The second is to take it for granted, without entering into any nice discussion, that S. 162 in its present form must be taken as overriding S. 27, Evidence Act: A I R 1925 Rang 101²⁶ and A I R 1926 Rang 112.²⁷ (3) The third is to arrive at the conclusion that S. 162, Criminal P. C., does abrogate S. 27, Evidence Act, by implication, on the ground that "any person" in S. 162, Criminal P. C., includes an accused person: A I R 1927 Nag 203.¹³ (4) The fourth is to assume that the Legislature in amending Sec. 162, Criminal P. C., could not possibly have intended to repeal by implication S. 27, Evidence Act, the provisions of which have been in force since 1872 and have been constantly applied and discussed in judgments, and on that assumption to conclude that S. 162 cannot apply to accused persons for, if it does, it will have the effect of repealing S. 27, Evidence Act: A I R 1926 Pat 232;⁵ A I R 1926 Lah 88;¹⁰ A I R 1926 Rang 116;³ A I R 1927 Cal 17;⁹ A I R 1928 Nag 103.²⁸ (5) The fifth is to hold simply that the provisions of the Evidence Act are quite independent of the sections in the Criminal Procedure Code and cannot be treated as impliedly repealed in consequence of the amendment of the Code of Criminal Procedure: A I R 1925 Mad 574²⁹ and A I R 1929 Nag 17.¹⁴ (6) And the sixth is to give the words "any person" in S. 162 their widest meaning by interpreting the language of the section literally without any reference to the intention of the Legislature, and then save S. 27, Evidence Act, not simply on the ground that the provisions of the Evidence Act are quite independent of those of the Criminal Procedure Code, but on the ground that the provisions of the Evidence Act being special cannot be affected by the provisions of the Criminal Procedure Code which are general. Section 27, Evidence Act, is a special provision because under it statements made to the police by an accused person when in custody relating to a fact discovered thereby may be proved but a similar statement made when the accused person is not in custody cannot be

26. ('25) 12 A I R 1925 Rang 101 : 84 I O 545 : 26 Cr L J 821, Bawa Rowther v. Emperor.
27. ('26) 13 A I R 1926 Rang 112 : 94 I O 706 : 27 Cr L J 658, Emperor v. Nga Kyaing.
28. ('28) 15 A I R 1928 Nag 108 : 108 I O 442 : 29 Cr L J 400, Sheo Balak Prasad v. Emperor.
29. ('25) 12 A I R 1925 Mad 574 : 86 I O 664 : 26 Cr L J 840, In re Semalai Goundan.

proved. Section 162, Criminal P. C., on the other hand is a general provision because it applies to all statements made to the police in the course of an investigation, whether the accused person is in custody or not. Hence, in view of the well-known principle of law *generalia specialibus non derogant* S. 27, Evidence Act, remains an exception to S. 162, Criminal P. C., and is unaffected by it: A I R 1928 Mad 1028⁸ and A I R 1932 Mad 391.¹⁹

The argument of special provisions remaining unaffected by general provisions was used in a modified form in A I R 1933 ALL 440.²³ There it was observed that the Evidence Act is a special law, as it is a law specially applicable to the subject of evidence. Therefore in the absence of specific provision to the contrary in the Criminal Procedure Code, nothing in that Code affects anything in the Evidence Act. Such diverse ways of approaching the thorny question are, however, not open now for three reasons which have materially altered the position: First, it is now settled law that S. 162, Criminal P. C., applies to both oral and written statements; secondly, it has been laid down by their Lordships of the Privy Council in A I R 1939 P C 47²⁵ that S. 162, Criminal P. C., applies to accused persons as well; thirdly, the subject is no longer a subsidiary issue but has come directly under consideration and has assumed such importance that it is no longer possible to stifle complex arguments by assumptions as to the intention of the Legislature or easy assertions to the effect that S. 162 in its present form must be taken as overriding S. 27, Evidence Act.

Before entering into any discussion on the present mode of approach, it is desirable to note how the Judicial Committee have indicated it in A I R 1939 P C 47²⁶ where their Lordships raised the question yet refrained from expressing any opinion and left the topic open:

The words of S. 162 are in their Lordships' view, plainly wide enough to exclude any confession made to a police officer in course of investigation whether a discovery is made or not. They may therefore pro tanto repeal the provisions of the section which would otherwise apply. If they do not, presumably it would be on the ground that S. 27, Evidence Act, is a "special law" within the meaning of S. 1(2), Criminal P. C., and that S. 162 is not a "specific provision to the contrary." Their Lordships express no opinion on the topic for whatever be the right view it is necessary to give to S. 162 the full meaning indicated.

Thus, at the present time, the problem of the conflict between S. 162, Criminal P. C., and S. 27, Evidence Act, may properly be

solved only on a careful consideration of two important points, raised earlier in very much the same form in A I R 1933 ALL 440²² mentioned above : (1) whether S. 27, Evidence Act, is a "special law" within the meaning of S. 1 (2), Criminal P. C., and (2) whether S. 162, Criminal P. C., is or is not a "specific provision to the contrary?" Before proceeding to discuss the above points, it is important to note another question arising out of an observation in their Lordships' judgment in A I R 1939 P C 47²⁵ which runs as follows :

Section 27 seems to be intended to be a proviso to S. 26 which includes any statement made by a person whilst in custody of the police and appears to apply to such statements to whomsoever made, e. g., to a fellow prisoner, a doctor or a visitor.

Now the question is whether by this sentence their Lordships intended to lay down definitely that S. 27 was a proviso to S. 26 only, and not also to S. 25, Evidence Act. Section 25 deals with confessional statements made to a police officer whereas S. 26 deals with such statements made to persons other than a police officer while the accused is in custody of the police. As Bhide J. remarks in his judgment in A I R 1940 Lah 129³⁰:

It is true that S. 26 does not say to whom the confession is made; but S. 25 entirely rules out confessions to police officers and, in the circumstances, it does not seem likely that confessions to police officers were also intended to be included within the scope of S. 26. So far as I can find S. 26 has always been taken to apply to confessions made to some person other than a police officer: *vide* commentary on S. 26 in the Indian Evidence Act by Ameer Ali and Woodroffe. This was apparently also the view of the Full Bench of the Allahabad High Court in 6 All 509.³¹

If therefore the words "provided that" in S. 27 could be referred back to S. 26 only, then obviously there would be no conflict between S. 27, Evidence Act, and S. 162, Criminal P. C., as S. 162 deals only with statements made to police officers; hence the questions of "special law" and "specific provision to the contrary" would not arise at all. The view however which has now been generally accepted is that S. 27 is not only a proviso to S. 26 but also to S. 25 : *vide* 31 ALL 592³² at p. 598 ; 45 Cal 557³³ at p. 566 and

30. ('40) 27 A I R 1940 Lah 129 : 188 I C 498 : 41 Cr L J 591 : ILR (1940) Lah 242 (F B), *Hakam Khuda Yar v. Emperor*.

31. ('84) 6 All 509 : 1884 A W N 229 (F B), *Queen-Empress v. Babulal*.

32. ('09) 31 All 592 : 3 I C 26 : 10 Cr L J 212 : 6 A L J 839 (F B), *Mt. Misri v. Emperor*.

33. ('18) 5 A I R 1918 Cal 88 : 44 I C 321 : 19 Cr L J 805 : 45 Cal 557 : 27 C L J 148 : 22 C W N 213, *Amiruddin v. Emperor*.

9 Lah 671.³⁴ As early as 1882, a Full Bench of the Allahabad High Court also held as above in 6 All 509,³¹ only Mahmood J. being of a contrary opinion. In view of the fact that their Lordships of the Privy Council in A I R 1939 P C 47²⁵ have not discussed the point at all and have not expressed any clear opinion, and also in view of the fact that their Lordships themselves have raised the questions of "special law" and "specific provision to the contrary," it is but reasonable to infer that the remark "S. 27 seems to be intended to be a proviso to S. 26" was simply an obiter and was not meant to be the expression of a definite opinion overruling the view accepted by the majority of the High Courts in India. Hence, accepting the position that S. 27 is a proviso to both Ss. 26 and 25, let us now return to the main points for discussion concerning the conflict between S. 27, Evidence Act, and S. 162, Criminal P. C.

After the Privy Council decision in A I R 1939 P C 47²⁵ which has once again started the discussion on the contradiction between S. 27 and S. 162, there have been six important decisions of the High Courts of India : A I R 1939 Pat 577;³⁵ A I R 1939 Mad 840;³⁶ A I R 1939 Mad 856;³⁷ A I R 1940 Nag 66;³⁸ A I R 1940 Lah 129³⁰ and A I R 1940 ALL 263.³⁹ In the Patna, Madras and Nagpur cases, the learned Judges have not considered it necessary to discuss the matter at length and have held that the Judicial Committee not having expressed any opinion on the topic it is still open to them to continue to be of the opinion that S. 162 of the Code has not in any way overridden S. 27, Evidence Act. The argument which appears to have weighed with their Lordships is that S. 27 is a special provision which is independent of S. 162 of the Code and is unaffected by it; hence, so long as a definite pronouncement is not made by the Judicial Committee in the matter, the practice which has been in vogue for the last

34. ('28) 15 A I R 1928 Lah 476 : 112 I C 347 : 29 Cr L J 1019 : 9 Lah 671, *Bulaqi v. Emperor*.

35. ('39) 26 A I R 1939 Pat 577 : 181 I C 1001 : 40 Cr L J 625 : 18 Pat 450 : 20 P L T 420, *Emperor v. Mayadhar Pothal*.

36. ('39) 26 AIR 1939 Mad 840:188 I C 311:41 Cr LJ 573:(1939) 2 MLJ 635, *In re Kapa Moranna*.

37. ('39) 26 A I R 1939 Mad 856 : 184 I C 593 : 41 Cr L J 41 : I L R (1939) Mad 947 : (1939) 2 M L J 455, *In re Subbiah Tevar*.

38. ('40) 27 A I R 1940 Nag 66 : 185 I C 310 : 41 Cr L J 158, *Motilal Puransao v. Emperor*.

39. ('40) 27 A I R 1940 All 263 : 188 I C 562 : 41 Cr L J 627 : I L R (1940) All 396 : 1940 A L J 241 (F B), *Baldeo v. Emperor*.

so many years of admitting in evidence statements made to a police officer in the circumstances provided for by S. 27 should be followed. In arriving at the aforesaid conclusion, the High Courts of Patna and Madras have relied on the arguments in A I R 1928 Mad 1028⁸ and A I R 1932 Mad 391¹⁹ while the Nagpur High Court has relied on A I R 1929 Nag 17¹⁴ and A I R 1933 ALL 440.²² In A I R 1939 Pat 577³⁵ Rowland J. observes:

Undoubtedly it has long been an unquestioned practice in all the High Courts that statements made to a police officer in the circumstances provided for by S. 27, Evidence Act, have been treated as admissible in evidence notwithstanding that they may have been made to an investigating officer during the progress of an investigation. And in A I R 1932 Mad 391¹⁹ Reilly J. has adopted the line of reasoning by which in A I R 1928 Mad 1028,⁸ S. 27, Evidence Act, and S. 162, Criminal P. C., were both given effect to, S. 162 having effect in every case except those to which S. 27 applies by way of exception or proviso.

In the absence of a definite pronouncement of the Judicial Committee to the contrary, I think it is permissible to follow that reasoning and to admit proof of a statement made by an accused person to an investigating officer in the special circumstances provided for in S. 27, Evidence Act.

In A I R 1939 Mad 840³⁶ Stodart J. says:

It has been the opinion of several learned Judges of this Court that the provisions of S. 27 have not been repealed by S. 162, Criminal P. C.: see the case in A I R 1928 Mad 1028⁸ and the case in A I R 1932 Mad 391.¹⁹ The ground on which the opinion has been based is that S. 27 embodies the special rule while S. 162, Criminal P. C., is the general rule and the latter according to the principle referred to by the Judicial Committee does not derogate from the former. We do not think that the aforesaid judgment in Privy Council Appeal No. 81 of 1938 (A I R 1939 P C 47²⁵) prevents us from following the decisions and precedents of this Court. We therefore think the statement made by the accused in this case to the Inspector after his arrest about the authenticity of which there can hardly be any doubt, was admissible in evidence against him;

and in A I R 1939 Mad 856³⁷ which was decided only two days later by the same Bench which decided A I R 1939 Mad 840,³⁶ it was observed:

The question therefore whether S. 162, Criminal P. C., has repealed S. 27, Evidence Act, so far as statements made to a police officer are concerned, has not been here decided by the Privy Council and we are not therefore debarred by this decision from following the rule laid down in previous decisions of this Court. We may observe that it has been recently held specifically by learned Judges of this Court that though S. 162, Criminal P. C., applies to statements made by accused persons, nevertheless S. 27, Evidence Act, is a 'special law' which is not derogated from by the general rule enacted in S. 162: see the dictum of Ramesam J., as he then was, in A I R 1928 Mad 1028⁸ and of Reilly and Sundaram Chetty JJ. in A I R 1932 Mad 391.¹⁹ The rule laid down in S. 1(2), Criminal P. C., "Nothing herein contained shall affect any special law now in force" is an application of the maxim "*generalia specialibus non derogant*."

In A I R 1940 Nag 66³⁵ again it was remarked:

It is true, as held by their Lordships of the Privy Council in A I R 1939 P C 47,²⁵ that the words of S. 162, Criminal P. C., are wide enough to exclude a confessional statement made to a police officer in the course of investigation whether a discovery is made or not. Their Lordships however left the question open whether or not such a statement would be admissible under S. 27, Evidence Act, which is a special law within the meaning of S. 1(2), Criminal P. C. In A I R 1933 All 440²² it was pointed out that there is no contradiction between S. 162, Criminal P. C., and S. 27, Evidence Act, and that by virtue of S. 1(2), Criminal P. C., any provision of the Evidence Act which is a special law as defined by S. 4 of the Code cannot be affected by the Criminal Procedure Code in the absence of a specific provision to the contrary made in that Code; and that there is no such specific provision modifying or altering S. 27, Evidence Act. The terms of S. 162, Criminal P. C., as amended by Act 18 of 1923 do not alter the provisions of S. 27, Evidence Act. That was the view taken by a Bench of two Judges of the late Court of the Judicial Commissioner in a case reported in A I R 1929 Nag 17¹⁴ where it was laid down that the provisions of S. 27, Evidence Act, are quite independent of S. 162, Criminal P. C., and that the amendment of that section made in 1923 was not intended to abrogate or impair the effect of S. 27, Evidence Act.

In none of the aforesaid cases therefore was any special importance given to S. 1(2), Criminal P. C., as a guide to a decision on the topic under consideration. That subsection contains the following sentence:

... in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force . . .

In A I R 1940 Lah 129³⁰ and *A I R 1940 ALL 263,³⁹ however, which were Full Bench cases, the method indicated by their Lordships of the Privy Council in A I R 1939 P C 47²⁵ of approaching this difficult subject has been strictly followed, and a hair-splitting discussion has been entered into with remarkable thoroughness and erudition on the words "special law" and "specific provision to the contrary" contained in S. 1(2), Criminal P. C. To turn first to the subject of "special law." As to the meaning of "special law" the consensus of opinion is that the definition of it given in S. 41, Penal Code, as a law applicable to a particular subject, which has been adopted for the purposes of the Criminal Procedure Code by virtue of S. 4(2) of that Code, should be strictly followed. The definition of 'general' and 'special' laws as given in Salmond's Jurisprudence, Craies on Statute Law and other English text books was considered by their Lordships in A I R 1940 Lah 129³⁰ to be inapplicable to the case before them, and Tek Chand J. observed as follows:

*In connexion with this Allahabad case see U. P. Act 9 of 1940—Ed.

Salmond divides the whole body of law — the entire corpus juris—into two parts: (1) "General", consisting of the ordinary law of the land, and (2) "Special" which according to his division, includes International Law, Martial Law, Foreign Law, Conventional Law, etc. . . . It is obvious that in the Code of Criminal Procedure the expression 'special law' is not used in contradistinction to 'general law' in this sense. Here, it has been given a specific meaning, namely that a 'special law' is one which deals with a particular subject.

"Nor", said Bhide J. in the same case, would it serve any useful purpose to discuss the meaning of the term 'special law' as used in English law or English rulings based thereon, because we must interpret the term as defined in S. 41.

So 'special law' being a law on a particular subject the question now is whether S. 27, Evidence Act, is a 'special law' according to this definition. Upon this point Young C. J. remarks in A I R 1940 Lah 129³⁰ at p. 133 that :

It is unnecessary to consider whether S. 27, Evidence Act, is a 'special law' within the meaning S. 1 (2), Criminal P. C., a point not free from difficulty—as, in my opinion, S. 162 is a 'specific provision to the contrary.'

And Monroe J. in the same case, agreeing with the view of the learned Chief Justice, frankly admits that he finds it impossible to interpret the words 'dealing with a particular subject'. With great respect, I do not follow how the learned Chief Justice concludes that it is unnecessary to consider whether S. 27, Evidence Act, is a 'special law' within the meaning of S. 1 (2), Criminal P. C. I am inclined to think that the expression 'specific provision to the contrary' in S. 1 (2), Criminal P. C., necessarily contemplates the existence of some special law in force which it is intended to affect. Hence, unless S. 27 is considered to be a special law, S. 162, Criminal P. C., even if it is a 'specific provision to the contrary', will not, in my view, have the effect of repealing pro tanto S. 27, Evidence Act.

The view of Tek Chand J. in the aforesaid case seems apparently to be quite sound. His Lordship considers that S. 27, Evidence Act, is a "special law" dealing with a particular subject, the particular subject being the admissibility of information, received from a person accused of any offence in the custody of a police officer, whether it amounts to a confession or not, when a fact is deposed to as having been discovered in consequence of such information.

It may however be argued that every section of the Evidence Act may in the same manner be considered to be 'special law' on the ground that the particular provision of the law of evidence contained in a particular section is a law on a particular subject. It may also be urged that the whole of the Evidence Act is 'special law'

as the Act deals with the particular subject of evidence. And, in this sense, every distinct enactment may be called a 'special law' as every distinct Act deals with only one particular subject. The point is therefore highly complex, and where the various arguments seem to be evenly balanced it is difficult to arrive at a definite conclusion. In the circumstances, Tek Chand J.'s view may be read along with an argument used in the same case by Dalip Singh J., which runs as follows :

It seems to me that particular subject cannot be defined in general words. It is always a question whether an Act or a particular section of the Act is a 'special law' dealing with a particular subject or not by comparison with the law with which there is an apparent conflict. It may be that a particular Act may be considered to be general with reference to another Act and be considered to be a 'special law' with reference to some other Act. Thus, in other words, the question whether a particular Act or a particular section is or is not a 'special law' is entirely a relative matter and could only be considered in comparison with the particular Act or section with which it has any apparent conflict.

Section 27, Evidence Act, may thus be called a 'special law' (i. e. a law dealing with a particular subject) only with reference to S. 162, Criminal P. C., with which it has an apparent conflict. Section 162, Criminal P. C., deals with the general subject of the inadmissibility of all statements made to a police officer in the course of investigation. But, in so far as S. 27, Evidence Act, deals with the admissibility of certain statements made under certain conditions, it deals with a particular subject with reference to S. 162 of the Code. Taking S. 27 in isolation it is difficult to say whether it contains any special law within the meaning of the definition in S. 41, Penal Code. Yet, having in mind the provisions of S. 162 of the Code, it does not appear unreasonable to argue that S. 27, Evidence Act, deals with a particular subject and hence is a 'special law.' And, for the purposes of the present topic, namely whether S. 27 is pro tanto repealed by S. 162, I think it is wiser to follow some such line of reasoning than to get lost in the labyrinth of academic arguments. But there is another argument about the meaning of the words 'particular subject' in S. 41, Penal Code, which also carries weight. That argument is that the expression 'special law' as defined in S. 41, Penal Code, only means special enactments creating fresh offences other than those made punishable under the Penal Code, e. g., the Excise Act, the Forest Act, etc. As Din Mohammad J. observes in A I R 1940 Lah 129³⁰:

It is obvious that this term (i. e. 'special law') was defined in the Penal Code on account of its use in S. 40, wherein the word 'offence' denoted a thing punishable not only under the Penal Code but under any special or local law 'as hereinafter defined.'

Evidently, therefore when in relation to the Penal Code the term 'special law' was used, it referred only to a law dealing with those matters which had not been dealt with in that Code, i. e., a law creating offences not contemplated by the Penal Code. Had the Legislature intended to use the term 'special law' in a different sense in relation to the Criminal Procedure Code, it would have defined the term in that Code itself and not merely relied on its definition given in the Penal Code. It might be argued that the Criminal Procedure Code as such has nothing to do with anything besides procedure and consequently laws creating new offences are outside its ambit. This is true but we cannot enter into the minds of legislators as to why they chose to use this term.

For the aforesaid view his Lordship relied on a case of the Lower Burma Chief Court reported in 22 I C 147⁴⁰ where it was held that the Whipping Act was not a special law because, although it dealt with the particular subject of whipping, it created no fresh offences, but merely provided a supplementary or alternative form of punishment for offences which are already punishable under the Penal Code or other enactments. Obviously, from this point of view, S. 27, Evidence Act, is not a special law as the subject it deals with does not create any fresh offences but merely relates to a particular rule of procedure in evidence.

Nevertheless, the argument of the Burma case referred to above may be met by saying that the general rule of interpretation of a section contained in any enactment is simply to find out the plain meaning of the language of the section. Admittedly, the definition of "special law" given in S. 41, Penal Code, is vague so far as the real intention of the Legislature is concerned. But, at the same time, the meaning of the language is quite clear, and the expression "particular subject" is wide enough to include many things more than enactments creating fresh offences. "Particular subject" in its plain meaning may include the subjects of procedure or evidence. And it may with reason be said that perhaps it was the very generality of the language of the definition in S. 41 which weighed with the Legislature, and it was considered sufficient to adopt that definition for the purposes of the Criminal Procedure Code instead of framing a new definition. It will be useful in this connection to quote

40. ('14) 1 A I R 1914 L B 145; 22 I C 147; 7 L B R 63; 15 Or L J 3, Emperor v. Po Han.

Bhide J.'s observations in A I R 1940 Lah 129³⁰ at p. 139 :

In the present instance the language of S. 41 is plain enough. To ignore the general language used in the definition of 'special law' as given in S. 41 and to put a restricted meaning on it owing to extraneous considerations would, I think, be open precisely to the same objection as the construction placed by most of the High Courts in India on the words 'any person' as used in S. 162, Criminal P. C., which was disapproved by their Lordships in the above ruling (i. e. A I R 1939 P C 47²⁵). If the intention of the Legislature was to confine the expression 'special law' to laws creating fresh offences other than those made punishable by the Penal Code, the Legislature could easily have framed the definition accordingly. I think, it may be safely presumed that it would not have, in that case, used the general language to be found in the definition in S. 41.

As against the case of the Lower Burma Chief Court (22 I C 147⁴⁰) decided by a single Judge, Bhide J. refers to a Calcutta case reported in 31 Cal 1⁴¹ and a Bombay case reported in 16 Bom 159.⁴² In the Calcutta case it was held by a Division Bench that the "Coroners Act" of 1871 was a special Act within the meaning of S. 1 (2), Criminal P. C., so as not to be affected by the Code, although it did not create any fresh offences but merely dealt with the procedure in certain cases. The view of the Bombay High Court also was in accordance with the plain meaning of the expression "special law". In discussing the subject of "special law" Dalip Singh J. raised another question in the aforesaid Lahore case at p. 136 :

... which, in the circumstances, is to be considered the special law? On the one hand, S. 27 may be said to be a 'special law' providing that statements made to police officers which lead to discoveries are to be admitted notwithstanding the general provisions that statements to police officers are to be excluded from evidence, on the other hand, it is possible to hold that S. 27 is the general rule providing that statements made by persons in custody to any one whatsoever which lead to discoveries are admissible in evidence whereas S. 162 is a special provision which lays down that statements made to police officers whether they lead to discoveries or not are inadmissible in evidence.

Undeniably there is point in this argument when the two sections (i. e., S. 27, Evidence Act, and S. 162, Criminal P. C.) are considered with reference to each other. With all respect, however, I must say that for the purposes of the present discussion it is unnecessary to consider that point of view. In view of the language of S. 1 (2), Criminal P. C., which reads 'nothing herein contained shall affect any special or local

41. ('04) 31 Cal 1; 7 C W N 889, Emperor v. Jogeshwar Passi.

42. ('92) 16 Bom 159, Queen-Empress v. Mahomed Rajuddin.

law now in force,' two things are clear. First, the provision which is to affect the special or local law must be contained in the Criminal Procedure Code. Secondly, the special or local law which is to be affected must exist outside the provisions of the Criminal Procedure Code. Therefore, for our present purpose, S. 162 of the Code may be a provision likely to affect some other special law, but it cannot itself be a special law within the meaning of S. 1 (2) of the Code.

One thing only remains to be said. The trend of decisions is to treat S. 27, Evidence Act, as 'special law' within the meaning of S. 1 (2), Criminal P. C.; yet the position at the present time is far from settled. Discussion on the topic is so very perplexing that in many cases it seems to have been deliberately avoided while in others it has been left in mid-air. The remedy, obviously, lies with the Legislature or the Judicial Committee. Before proceeding to discuss the second point, namely whether S. 162, Criminal P. C., is a 'specific provision to the contrary' within the meaning of S. 1 (2) of that Code, it is necessary to give in brief the history of S. 162 of the Code and S. 27, Evidence Act, on which considerable stress has been laid by their Lordships of the High Courts of Allahabad and Lahore. In the Code of Criminal Procedure of 1861, there were sections containing some of the present provisions of S. 162. There were also sections covering the provisions now contained in Ss. 25 to 27, Evidence Act, which were subsequently removed from the Criminal Procedure Code and incorporated in the Evidence Act, 1 of 1872, as Ss. 25, 26 and 27. In the Code of 1882, S. 162 was worded as follows :

No statement, other than a dying declaration, made by any person to a police officer in the course of an investigation under this chapter shall, if reduced to writing be signed by the person making it, or shall be used as evidence against the accused.

Nothing in this section shall be deemed to affect the provisions of S. 27, Evidence Act, 1872.

In the Code of 1898, the section was altered as below :

(1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if taken down in writing, be signed by the person making it, nor shall such writing be used as evidence :

Provided that, when any witness is called for the prosecution whose statement has been taken down as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof: and such statement may be used

to impeach the credit of such witness in manner provided by the Evidence Act, 1872.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of S. 32, cl. (1), Evidence Act, 1872.

Finally, by the amending Act of 1923, the section was redrafted as under :

(1) No statement made by any person to a police officer in the course of an investigation under this chapter shall, if reduced into writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall, on the request of the accused refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145, Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross examination:

Provided further, that, if the Court is of opinion that any part of such statement is not relevant to the subject-matter of inquiry or trial or that its disclosure to the accused is not essential in the interests of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

(2) Nothing in the section shall be deemed to apply to any statement falling within the provisions of S. 32, cl. (1), Evidence Act, 1872.

It is also noteworthy that the words "in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force" which are contained in S. 1 (2) of the present Criminal Procedure Code, were also contained in S. 1 (2) of the Code of 1882. Now, having in view the above history of the sections under consideration, let us see how the question whether S. 162 is a 'specific provision to the contrary' has been discussed by distinguished Judges of the High Courts of Allahabad and Lahore. As in all difficult points, there have been found two ways of looking at the question—the one leading to the conclusion that S. 162 is a specific provision to the contrary, the other leading to the conclusion that it is not. There is logic in each method of approach and it is hard to say which method is more consistent with reason and the ordinary rules of interpretation. In support of the conclusion, representing the majority view, that S. 162 is a specific provision to the contrary the arguments used may be put as follows: Admittedly, there is no express

provision in the Criminal Procedure Code affecting S. 27, Evidence Act. But the word used in S. 1 (2) of the Code is "specific", not "express." And the word "specific" appears to denote something less exacting than the word "express." In Murray's Oxford Dictionary the word is defined as 'precise or exact in respect of fulfilment, conditions or terms; definite, explicit.' There could hardly be anything more definite or explicit than the terms of S. 162, Criminal P. C.

It is important to note that when S. 162 of the Code of 1882 was drafted, the Legislature had considered that the section constituted a specific provision to the contrary within the meaning of S. 1 (2) of the Code. This will be clear from what follows. Section 162, Criminal P. C. of 1882, excluded all statements to the police, oral or written, other than only dying declarations. Therefore, statements leading to the discovery of a fact which were admissible under S. 27, Evidence Act, 1872, were also apparently excluded by the provisions of S. 162 of the Code. Section 1 (2) of the Code, however, contained the provision :

In the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force.

Section 162, therefore, would not affect S. 27, Evidence Act, unless it contained a

'specific provision to the contrary' within the meaning of S. 1 (2) of the Code. Clearly, the Legislature was of opinion that S. 162, as then drafted, did contain a 'specific provision to the contrary,' for, if it had thought otherwise, it would not have added a proviso to the section saving S. 27, Evidence Act.

This saving clause concerning S. 27 was omitted in the Code of 1898. But it is possible to understand that omission. Under S. 162 of the Code of 1898, only written statements were excluded. Oral statements were admissible and hence it was unnecessary to add the proviso regarding S. 27. By the amending Act of 1923, however, both oral and written statements were again excluded as in the Code of 1882. Yet the saving clause was not re-introduced. This is significant. Obviously, the Legislature had the provisions of the Evidence Act in mind, for S. 145 and S. 32 (1) of the Act have been expressly saved. It cannot thus be said that the Legislature had overlooked the effect of the amended S. 162 on S. 27, Evidence Act. Why then, if S. 27 was intended to remain unaffected, was the proviso concerning S. 27 not re-introduced in 1923? The answer is that the Legislature did not want to save the provisions of S. 27, and hence deliberately omitted the proviso.

(To be continued.)

REVIEWS

The Law of Evidence in Criminal Cases (3rd Edn.) by SARAT CHANDRA CHATTERJI, *Advocate, Calcutta*. Published by Eastern Law House Ltd., 15, College Square, Calcutta. Pages 580. Price Rs. 5.

Except some alterations and additions in headings and sub-headings of the notes, the author in this edition has left the previous arrangement in tact. The case law up-to-date has been incorporated at proper places. Three appendices have been given. The index has been made more elaborate. The printing and the get-up are in keeping with the reputation of the publishers.

The Law of Benami Transactions (3rd Edn.), by A. GHOSH, B.A., B.L. Published by Eastern Law House Ltd., 15, College Square, Calcutta. Pages 868. Price Rs. 5.

The subject of this book though a difficult and complicated one has been very lucidly explained by the author in this book. The knotty questions relating to the law of

Benami transactions have been solved and explained in easy language. The case law has been brought up-to-date. The gradual development of the law of Benami has been traced from its earlier stage to the current form. In short the author has tried to make this book a complete Code of the laws of Benami.

The Tenancy Law of Central Provinces, by R. W. FULAY, M.A., LL.B., *Advocate, Nagpur*. Published by Messrs. Chandurkar Bros., Typewriter Dealers and Law Book Publishers, Opposite Narsing Talkies, Mahal, Nagpur. Pages Over 500. Price Rs. 6.

Although there are two books on the C. P. Tenancy Act in the market, this is the first book after the Tenancy Act has been amended by Act XI of 1940. The author has given the history of the land system in the Central Provinces to facilitate the students of Land Tenures of this Province. The

principles underlying the sections have been clearly laid down and in a concise manner. Several appendices have been added at the end to make the book more useful to the readers. The case law has been digested up-to-date. Statements of Objects and Reasons have also been given. In short the author has spared no pains to make the book useful to the profession.

The Arbitration Act, 1940, by S. C. Das, M.A., L.L. B., *Editor, Allahabad Law Times*. Published by Allahabad Law Journal Press, Allahabad. Pages 346. Price Rs. 6.

The notes to the sections are exhaustive and topic under each section is dealt with under important sub-headings. Case law, both Indian and English has been brought to the end of 1940. The author has usefully given the relevant English and Indian Acts in the Appendix. The book is bound to be of great use to the legal profession.

Prem's Cross-examination, by DAULAT RAM PREM, B.A., LL.B., *Advocate, 10, Mozang Road, Lahore*. The book can be had from Arora Law House, Lahore. Pages 780. Price Rs. 12-8-0.

No doubt, cross-examination is an art and is learnt by practice and experience; still there are certain rules formulated by eminent advocates, a knowledge of which will surely serve as a safe guide to a lawyer to enable him to avoid several pitfalls in the course of the cross-examination. In this book the author has explained them. He has also taken pains to collect instances of skilful cross-examination by eminent lawyers where success has been achieved. The subject-matter has been arranged under suitable chapter headings and principles have been explained with illustrations. Various kinds of witnesses have been dealt with separately. The chapters relating to behaviour of counsel and Judges during cross-examination, etiquette, professional ethics and abuse of cross-examination should be read by every lawyer. Thus, the author has presented the subject of cross-examination in a systematic and exhaustive manner. We have great pleasure in recommending this useful book to the members of

the legal profession senior or junior. The printing and get up leave nothing to be desired and the price is moderate.

Income-tax Gazette, Vol. 1, No. 1, by B. R. JAIN. Published by Income-tax Law Publishing House, Chandni Chowk, Delhi. Yearly subscription Rs. 10.

This is a new monthly journal on Income-tax and Excess Profit-tax law. The journal is divided into 5 parts with separate pagination for each part viz., (1) Articles on points of law, (2) Notes and Comments, (3) Reports of cases decided by High Courts, (4) Income-tax and Accounts, and (5) Recent Amendments and Notifications. We are sure that this journal also of the author will be found useful by all those who have to do something with Income-tax law as his other works on the law of Income-tax.

The All India Criminal Digest (1904-1940) (Vol. I), by S. K. IYER, B.A., B.L., *Advocate High Court, Madras*. Published by H. D. Lall Bir for Law Book Depot, Krishna Nagar, Lahore. Columns 1816. Pre-publication price Rs. 21 and Post publication Rs. 24 (for three volumes).

We have received Vol. I of the above Digest which is to be published in 3 Volumes. The cases have been digested under appropriate headings and sub-headings and the catchwords and headnotes of the case are clear and comprehensive. The reference to All India journals like Criminal Law Journal and All India Reporter and to the provincial journals have invariably been given. This greatly enhances the utility of the publication. We are confident that this digest will be welcomed by practitioners on the criminal side. The printing and get-up are good.

The Law College Magazine, Bombay (Vol. XII, No. 2). Edited and published by PROF. K. R. MEHTA, B.A., LL.B., ADVOCATE (O. S.), *Government Law College, Bombay*. Pages 96. Current Year's subscription Rs. 3.

We are in receipt of the March 1941 part of this Magazine and are glad to note that this part also contains many interesting and instructive articles.

by KRISHNA KUMAR BOSE, M.A., B.L., *Pleader, Sambalpur (Orissa)*.

(Continued from page 63).

The fact that certain other sections of the Evidence Act which have not been expressly affected by S. 162 have indisputably been affected also lends support to the view that it is possible to interpret S. 162 as having affected S. 27, Evidence Act, although that section has nowhere been expressly affected. Section 157, Evidence Act, is a case in point. That section has not been expressly affected by S. 162, but it cannot be doubted for a moment that S. 162 has rendered inadmissible the statement made by a witness to a police officer in the course of investigation for the purpose of corroborating such witness in Court. To sum up therefore in the words of Collister J., in A I R 1940 ALL 263³⁹ at page 266 :

If we carefully examine the language of S. 162, Criminal P. C., if we consider the express reference to S. 145 and S. 32 (1), Evidence Act, and the analogy of S. 157 of that Act, to whose provisions there is no reference in S. 162, Criminal P. C., and if we attach due significance to the omission of the Legislature to re-introduce in the present Act the saving proviso in respect to S. 27, Evidence Act, the logically inescapable conclusion is that S. 162, Criminal P. C., contains provisions plainly and directly, and therefore specifically, affecting S. 27, Evidence Act, *quoad* statements made under that section by an accused person to a police officer in the course of an investigation. In other words, there is a 'specific provision to the contrary' within the meaning of S. 1 (2), Criminal P. C.

On the other hand, the arguments leading to the contrary conclusion, as used by Bhide J., in A I R 1940 Lah 129,³⁰ run as follows :

According to the dictionary . . . the word specific means 'definite' or 'distinctly formulated.'

The use of the word 'specific' in a saving clause like that contained in S. 1 (2), Criminal P. C., seems exceptional. The usual phraseology adopted in cases when contradiction by mere implication is intended to be excluded is 'express' provision to the contrary (see for example the wording of Sacs. 193 and 358 as compared with that of S. 369, Criminal P. C.). The term 'express' means 'what is not left to mere implication' (see Wharton's Law Lexicon). I am inclined to think that the word 'specific' is even stronger.

There is, however, nothing in S. 162, Criminal P. C., to show that the attention of the Legislature was directed to the subject of 'discovery' which is dealt with in S. 27, Evidence Act, and that it contemplated wiping out this important exception to the rule excluding confessional statements to the police. Nor can one conceive of any good reason for doing so. For, when the genuineness of a statement or confession made to the police is guaranteed by the 'discovery' there can hardly be any good ground for excluding such information from being used as evidence.

As against the argument that the attention of the Legislature was drawn to the Evidence Act while framing S. 162, Criminal P. C., and yet the Legislature did not introduce any saving clause with respect to S. 27, as it did with respect to S. 32 (1), "it must be noted . . . that the saving clause with respect to S. 32 was not introduced at the time of the amendment of the Code in 1923, but had been introduced long ago in 1898. . . . When the provisions of S. 162, Criminal P. C., were amended in 1923, . . . it would have been certainly better if the Legislature had re-introduced a saving clause with respect to S. 27. But I do not think that it would be reasonable to infer therefrom that the Legislature intended to repeal S. 27, Evidence Act, to any extent. The omission may be due to two reasons. The Legislature may have overlooked the fact that the amendment of S. 162 was likely to affect S. 27, as its attention was not drawn to the subject-matter of S. 27, viz. 'information leading to discovery.' Or it may have considered that the subject-matter of S. 27 being sufficiently distinct, and limited in its scope, it could not be affected on the principle embodied in the maxim '*generalia specialibus non derogant*'. . . .

However, whatever the precise reasons for the omission may be, the question is whether the omission to add a saving clause with respect to S. 27 has resulted in a *pro tanto* repeal of S. 27. If there has been any such repeal, it could only be by implication. But such repeal by implication seems to me to be clearly excluded by S. 1 (2), Criminal P. C., which lays down that the provisions of special enactments will not be affected unless there is a 'specific provision to the contrary'.

Incidentally, . . . it is worth noting that although the question of repeal of various provisions of the Evidence Act and other enactments was apparently brought under review in 1938, when the Repealing Act of 1938 was passed, the Legislature did not think of amending S. 27, in any way. The presumption is that the section as it stands still expresses correctly the intention of the Legislature.

With the greatest respect for the aforesaid arguments of the learned Judges, I venture to think that there may yet be another line of reasoning. It is unnecessary to go behind the plain language of the section to its history or to the intention of the Legislature. The ordinary rule of interpretation of a statute is to take the language as it stands and give it its most natural meaning. Following this method of interpretation let us first of all try to find out the meaning of the clause "in the absence of any specific provision to the contrary, nothing herein contained shall affect any special or local law now in force."

As this clause indicates, the general rule, which is given in a negative form, appears to be that no provision contained in the

Criminal Procedure Code shall affect any special or local law in force. If any special or local law is to be affected, there must be a specific provision to the contrary (i. e., contrary to this general rule), saying, in an affirmative form, that the particular special or local law has been affected. Now, if we can bring ourselves to think that S. 27, Evidence Act, is a 'special law,' we should also expect, in view of S. 1 (2), Criminal P. C., that, if S. 27 were intended to be affected, a provision stating that it was affected would have been introduced in S. 162. Whatever meaning be given to the word 'specific', whether it be considered something less exacting, or something stronger, than the word 'express', it is apparent that the word signifies something other than 'implied.' Hence, even if any provision affecting S. 27 is contained in S. 162 of the Code in an implied form, it is not sufficiently 'specific' (i. e., definite, distinctly formulated) to affect S. 27, Evidence Act. Incidentally, I am inclined to think that the expression "to the contrary" in S. 1 (2), Criminal P. C., has not received that attention of their Lordships which it deserves. Their Lordships seem to have interpreted the expression as meaning 'contrary to the provisions of the special or local law.' This is clear in the observation of at least one learned Judge. Bhide J. says in A I R 1940 Lah 129³⁰ at p. 140 that "The next point for consideration is whether S. 162, Criminal P. C., is a "specific provision" contrary to S. 27, Evidence Act." It is, I think, this interpretation that has led most of the learned Judges to conclude from the mere contrariety between S. 162 and S. 27 that S. 162 is a specific provision to the contrary. In my humble opinion, however, the words 'to the contrary' mean 'contrary to the general rule in S. 1 (2), Criminal P. C., stating that nothing contained in the Code shall affect any special or local law.'

There is yet another point to be noted in S. 1 (2), Criminal P. C. This sub-section indicates that the provisions of the Criminal Procedure Code may affect any law other than a special or local law, where there is a conflict between the provisions of the Code and those of any other law. In other words, a general law may be affected by the provisions of the Criminal Procedure Code. This explains how S. 157, Evidence Act, has been affected by S. 162, Criminal P. C., although it has not been expressly affected. Section 157 is a general law with reference to S. 162 of the Code. It provides that a former state-

ment made by a witness relating to some fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved for the purpose of corroborating the testimony of such witness in Court; while, S. 162 provides the special rule that statements made to a police officer in the course of an investigation shall not be used for any purpose except as provided in the section itself. In support of the view that the provisions of the Evidence Act contained in S. 157 are general, two cases may be referred to, A I R 1925 Lah 399⁷ and G I C 101.⁴³ It is therefore clear that the Legislature considered that the language of S. 1 (2), Criminal P. C., was plain enough for the purpose of affecting S. 157, Evidence Act, which constituted a general law.

Although at the time of writing I cannot give any ruling to support the view that the provisions of S. 32 (1) and S. 145, Evidence Act, are also general provisions with reference to S. 162 of the Code, I venture to think that they are so. Section 32 (1) provides the general rule that a statement by a person, to whomsoever made, as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is relevant in cases in which the cause of that person's death comes into question. Section 162 (1), on the other hand, provides that when the statement is made to a police officer in the course of investigation it shall not be used for any purpose. Section 162 thus deals with statements made to a particular class of persons and hence the provisions of S. 32 (1), Evidence Act, may well be considered as general in contradistinction to those of S. 162, Criminal P. C. Similarly, S. 145, Evidence Act, provides the general rule that a witness may be cross-examined as to any statements as to relevant facts made by him on a former occasion, in writing or reduced into writing, while S. 162 provides the special exception in the case of statements made to a police officer prohibiting their use for all purposes. I think the provisions of the Evidence Act contained in Ss. 32 (1) and 145 were as a matter of fact considered by the Legislature to be general provisions. And, because S. 1 (2), Criminal P. C., does not protect general provisions it was considered necessary by the Legislature to introduce the provisos in S. 162 of the Code to save the provisions of S. 145 and section 32 (1).

43. ('10) 7 A L J 468 : 6 I C 101, *Rustam v. Emperor*.

Section 27, Evidence Act, however, being a special law with reference to S. 162, it was not necessary to protect it by means of a special provision. That section could only be affected by means of a specific provision to the contrary. The fact that the saving clause concerning Sec. 27 contained in the Code of 1882 was subsequently omitted also leads us to think that when the section was redrafted it was considered by the Legislature that the saving clause was not really needed.

I think, in the arguments given above, I have been able in my own way to answer all the three questions which have created a great deal of confusion: (1) Why Ss. 32 (1) and 145, Evidence Act, have been expressly saved; (2) Why S. 157, Evidence Act, has been affected although there is no provision stating that it has been affected; (3) Why the saving clause with respect to S. 27, Evidence Act, which was inserted in S. 162 of the Code of 1882 was not re-introduced in the corresponding section of the present Code. It may be said, of course, that I have based my argument on the assumption that S. 27, Evidence Act, is a "special law", while Ss. 32 (1), 145 and 157 are general laws with reference to S. 162, Criminal P. C. I admit to have worked on that assumption but I must say that I have made no assumption for which I have not attempted to give a reason. Once it is conceded that S. 27, Evidence Act, is a special law and Ss. 32 (1), 145

and 157 are not special laws, it does not appear unreasonable to argue in the way I have done.

Before concluding this long article, I must add that the question of pro tanto repeal of S. 27 being one of vital importance for the purposes of criminal trials, and the law on the point being at the present time extremely uncertain, specially because of the difficulty in interpreting 'special law' and 'specific provision to the contrary,' it is time the Legislature or the Judicial Committee stepped in to settle the legal position. All the High Courts except the High Courts of Allahabad and Lahore still adhere to the view that S. 27, Evidence Act, being a special provision is unaffected by the provisions of S. 162 of the Code. For reasons given above, I am also of the opinion that S. 27 has not been affected by S. 162. Yet the fact that in two Full Bench decisions of the High Courts of Allahabad and Lahore, A I R 1940 ALL 263;³⁹ AIR 1940 Lah 129,³⁰ a thorough and careful consideration of the whole question in the light of S. 1 (2), Criminal P. C., has led their Lordships to conclude that S. 162 in its present form does pro tanto repeal S. 27, Evidence Act, is significant. These two cases give the latest pronouncements on the subject and they indicate that there is a progressive tendency to discard the accepted view and treat S. 162, Criminal P. C., as having repealed S. 27, Evidence Act, pro tanto.

Certain anomalies in the Madras Agriculturists' Relief Act, 1938.

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Authors of the Commentaries on the Madras Agriculturists' Relief Act.

The Madras Agriculturists' Relief Act was enacted by the Provincial Legislature with the object of giving relief to indebted agriculturists in the Province of Madras. It is since three years that the Act has been in force and within that short compass more than two hundred judicial pronouncements were made in order to interpret and explain the provisions of the small enactment which bristles with difficulties. The validity of the Madras Agriculturists' Relief Act is not free from doubt at least with reference to original promisees and holders in due course of a promissory note. His Lordship the late Sir S. Sulaiman J. observed in A I R 1941 F C 47¹ that the Act did not draw any distinction between the original promisee and a

holder in due course and that the special hardship that would be inflicted on the latter was not at all taken into account in the Act and that the special protection given to bona fide holders in due course by the Negotiable Instruments Act read with the Usurious Loans' Act was destroyed. His Lordship the Chief Justice of the Federal Court of India observes :

I doubt whether any Provincial Act could in the form of a Debtors' Relief Act fundamentally affect the principle of negotiability or the rights of a bona fide transferee for value.

His Lordship Sir S. Varadachariar expressed the same view in the said case. In the light of the above observations, the Act is defective in so far it offends against the Negotiable Instruments Act with particular reference to holders in due course. Various

1. ('41) 28 A I R 1941 F C 47 : 192 I O 225, Subramanyam Chettiar v. Muthusami Goundan.

difficulties arise in the construction and application of Ss. 19 and 20. Section 19 deals with the amendment of certain decrees and requires an application to be filed by the judgment-debtor who is an agriculturist to get his debt scaled down under the Act. No doubt S. 20 confers a benefit on the debtor in that he can at once get the execution proceedings stayed if he is entitled to the benefits of the Act. But take a case where the judgment-debtor in answer to the execution petition against him files a counter petition and prays that the debt ought to be scaled down as per the provisions of the Act. It is really a matter for consideration whether an application under S. 19 is necessary under such circumstances or whether the matter could be disposed of on the counter being filed by the judgment-debtor in reply to the execution petition. The better view seems to be, having regard to the provisions of S. 7 which bars the recovery of any sum in excess of the amount scaled down, that the question of scaling down as well as whether the person claiming relief is entitled to the benefits of the Act or not ought to be decided in the execution proceedings itself if the judgment-debtor desires such a course.

In (1941) 1 M L J N R C 37² it was held

2. ('41) 1941-1 M L J N R C 87, Venkatachari v. Srinivasa Varadachari.

relying on A I R 1939 Mad 500³ that there could not be successive applications by co-judgment-debtors under S. 20 when once a stay had been obtained by one of the judgment-debtors. This would work hardship to the judgment-debtors at least in one instance. For example, one of the several co-judgment-debtors in collusion with the decree-holder obtains a stay on a petition under S. 20, but does not further proceed under S. 19. Then what is the position of the other judgment-debtors? Neither S. 19 nor S. 20 makes the position clear. The Full Bench of the Madras High Court held in A I R 1941 Mad 235⁴ that the rules framed under S. 28 of the Act were ultra vires, and that the right of appeal could not be inferred unless by express enactment such rights are conferred. If the rule-making power is denied to the Local Government by the High Court in the matter of appeals, can a new remedy be created for declaring the amounts due by an agriculturist by means of an original petition. These and several other anomalies in the Act require the immediate attention of the Government.

3. ('39) 26 AIR 1939 Mad 500 : 183 I C 865 : ILR (1939) Mad 530 : (1939) 1 M L J 888, Gaja Gopi Reddi v. Rami Reddi.

4. ('41) 28 A I R 1941 Mad 235 : ILR (1941) Mad 261 : (1941) 1 M L J 164 (F B), Nagappa Chettiar v. Annapurni Achi.

Mimansa Rules of Interpretation ; Their Importance and Study

by MR. KASHI PRASAD SAKSENA, *Advocate, and*
Author of Hindu and Muslim Law, Lucknow.

This article deals with the rules of interpretation with special reference to Mimansa Aphorisms. The rules contained in Jaimini's Mimansa are supposed to be the rules of interpretation of Hindu law. Jaimini collected these rules in his 'Mimansa Sutrās' with the object of introducing critical insight into those who studied the revealed law. His work does not discriminate between civil law and religious duty, the performance of which secures merit. His aphorisms are highly abstruse and require voluminous commentaries to expound their meaning. His work discloses the scholastic method of interpretation. The science of interpretation of Hindu law is quite peculiar and different from that of the Western system which cannot be applied to Hindu law. Jaimini's Rules of Interpretation, even to-day, are the only rules which help us in construing Hindu law. The notion that

Maxwell's Law of Interpretation can be used for the interpretation of Hindu law should be dispelled. The one reason for such a wrong notion is that people do not know the science and are mostly unfamiliar with the Sanskrit language. Another reason is that the rules of interpretation found in Hindu law-books either occur incidentally in connexion with the treatment of the substantive law on the lines adopted by particular writers or purport expressly to be the reproduction of some one or other of the Mimansa principles of interpretation. For the proper study of the subject, the former class of rules would not be of much benefit, but a systematic code of rules of the Mimansa principles of interpretation alone can help us. The aphoristic rules of Mimansa came into existence at a time and under circumstances that rendered it difficult to modernise their effect and purpose.

But even under these disabilities, the author has tried to treat the subject on modern lines and has compared these principles with those of the Western law of interpretation. Savaraswami and Kumarila Bhatta, the great commentators, have not been of much help in this connexion, as they illustrate the matter mostly with reference to the religious and metaphysical questions. Laughakshi Bhaskara and Apadeva have rendered great service in treating the subject on modern lines.

The Mimansa rules undoubtedly apply to the exposition of the Vedas. They 'consist chiefly of a critical commentary on the Brahmana or ritual portion of the Veda in its connexion with the Mantras.' They provide 'a correct interpretation of the ritual of the Veda and the solution of doubts and discrepancies in regard to Vedic texts caused by the discordant explanations of opposite schools.' But, in theory, the Mimansa rules have been employed for the interpretation of the Smriti texts as well. Even so their application to these texts becomes a debatable point. Later writers, such as Vijnaneswara, Apararka, Jimutavahana, Devanda Bhatta, Kulluka and Nilakantha, have considered this matter and are of the view that the Mimansa rules are quite effective and authoritative in reconciling apparently conflicting Smriti texts and in interpreting and giving effect to them, though primarily they were intended for the exposition of the Vedas. Apastamba very ingeniously based his argument upon the principle that the statement of a fact is not a rule. He established equal right of the son to the father's wealth. Visvarupa, Medhatithi and Haradatta made but little use of any such rules in regard to positive law. Vijnaneswara utilizes Mimansa rules in establishing the right of the widow and also in I. 1. 10, I. 1. 11 and II. 1. 31. The Dattaka Mimansa used them in I. 1. 35-41, IV. 4. 65-66 and VI. 6. 27-31 and the Dattaka Chandrika in I. 1. 24 and II. 2. 4. Jimutavahana in II. 5. 16-19 makes use of the rules of Jaimini and uses the Holakadhikarana in II. 40 and VI. 1. 22 and gives its meaning to be that where from a custom or a Smriti a Vedic rule is inferred that custom or Smriti proceeds from it, and we should not go further and postulate more than one rule concerning the same subject. Regarding the text about the division of property after father's death, Jimutavahana establishes that it is an Anuvada and deduces the absolute right of the father: a mode of reason-

ing that cannot satisfy the ordinary mind. Vijnaneswara (II. 1. 34) made use of Vidhi Vaishmya meaning the variability of a rule, which is not allowable, in connexion with the widow's rights.

The importance of the Mimansa rules had been so much lost sight of that they practically became a dead letter. The Mimansa has been referred to us as one of the fourteen sources of knowledge (Yajnavalkya I.3). The essential qualification of a Parishad which was to declare the law where no Smriti rule existed and had to decide doubtful points of law, was the knowledge of the Mimansa. Manus (XII. 103-112), Baudhayana (I. 1.1.8), Vyas (III.20) and Gautama (XXVIII. 48) have equally emphasised the importance and the study of Mimansa in connexion with the study and interpretation of Hindu law. Its importance has been increased because of the characteristically classic Sanskrit language in which the Hindu law is found and also because of its having a divine source. The subject has become terse and difficult as there is admixture of legal rules with moral and ritual principles. In view of the difficulty in separating the legal from the religious or moral precepts, some rules of guidance and interpretation become necessary. But one must bear in mind that knowledge of Sanskrit and of the Mimansa rules of interpretation is not enough for their correct application. Extensive and practical knowledge of the details of the Vedic sacrifices and rituals and specialised training as a Mimansaka are indispensable.

Mimansa means the investigation of the meaning of the Vedas. Mimansa rules grew up as an independent branch or faculty of Sanskrit studies which has two divisions according to the Sanskritists. One, the *Purva Mimansa* of Jaimini, and the other *Uttara Mimansa* of Sri Badarayana. The former concerns itself with the proper interpretation of the rituals contained in the Vedas. The line of reasoning propounded in this system has obtained general authority. The Mimansa is now treated as the sole guide in matters of interpretation. The *Mimansa Sutras* are finally divided into *Adhikaranas* or topics, each covering one doubtful point and by a process of reasoning the right conclusion is arrived at. The five parts of every topic are: (1) *Vishaya vakya* (a Vedic sentence) as to which there is (2) *Samsaya* (doubt as to its correct meaning); (3) *Purvapaksha* (a prima facie view put forward by the objector); (4) *Uttarapaksha* (refutation of the primary view); and (5)

Siddhanta (conclusion). They present the mode of interpretation in a very systematic way. The topics are arranged according to particular categories such as, authoritative-ness, indirect precept, etc. It is treated logically, commencing with the proposition to be discussed, the *Purvapaksha*, the *Uttara-paksha* and the *Siddhanta*. The following remarks made by Colebrooke as regards Mimansa Rules are very appropriate :

It will be observed as has been intimated in speaking of the *Adhikaranas* in the Mimansa that a case is proposed, either specified in Jaimini's text or supplied by his scholiasts. Upon this a doubt or question is raised, and a solution of it is suggested, which is refuted, and a right conclusion established in its stead. The disquisitions of the Mimansa bear therefore a certain resemblance to juridical questions and, in fact, the Hindu law being blended with the religion of the people, the same modes of reasoning are applicable, and are applied to one as to the other. The logic of the Mimansa is the logic of the law, the rules of interpretation of civil and religious ordinances. Each case is examined and determined upon general principles; and from the cases decided the principles may be collected. A well-worded arrangement of them would constitute the philosophy of the law; and this is, in truth, what has been attempted in the Mimansa. Jaimini's arrangement however is not philosophical; and I am not acquainted with any elementary work of this school in which a better distribution has been achieved.

The Mimansa Rules of Interpretation may present some difficulty in the first instance but after a careful study they will appear simple and may be applied by any lawyer in the construction of a statute or a document. They have been treated on modern lines and by comparison with the Western system they do not suffer in the least. On good many points there are similarities but at many places they differ. A few instances would better illustrate the point in question. A contradiction of texts should be explained by their being applicable in different circumstances तुल्यबलविरोधे विकल्पः or by supposing that one contains a general rule and the other a special one. Similarly, the words which have been defined in the Smritis ought to be taken in that sense according to the rule that the same word or sentence should not be understood in two different senses in the course of the same discussion (see 43 Cal 944¹ at p. 967; 36 Bom 389² at p. 356; 38 Mad 1144³

1. ('17) 4 A I R 1917 Cal 575 : 34 I C 10 : 43 Cal 944 : 20 C W N 489 : 23 C L J 372, Gungadhar Bogla v. Hira Lal.

2. ('12) 36 Bom 389 : 14 I C 438 : 14 Bom L R 89, Tukaram v. Narayan.

3. ('15) 2 A I R 1915 Mad 63 : 25 I C 957 : 38 Mad 1144 : 27 M L J 358, Meenakshi v. Muniandi Panikkan.

at pp. 1150, 1151; 54 ALL 698.⁴) So is the rule that the singular includes the plural or the masculine includes the feminine or the greater includes the less or the primary sense of a word should be preferred to its secondary sense. In the same way, there is a maxim that the special rule prevails over the general, or the principle that where there is an exception to a general rule, the exception should be confined within strict limits, 43 Cal 944¹ at p. 970, or the rule that a mere recital of a reason for an injunction (*Arthavada*) neither adds to nor deducts from the rule itself.

The *Vikalpa Maxim* that if authorities of equal force be conflicting, either may be followed, is frequently used when the history of a rule of law has been forgotten (Gautama, I. 34). In case of a real conflict, Yajnavalkya (IV. 20) laid down the rule that when there is a conflict of Smritis, *reason* must prevail स्मृत्योर्विरोधे न्यायस्तु बलवान् व्यवहारतः and Narada (IV. 40) also says that in case of conflict of Smritis, decision should be according to reason धर्मशास्त्रविरोधे तु युक्तियुक्तो विधिः स्मृतः. The following rules which are often overlooked by commentators and lawyers are more important than many oft-quoted ones which lead only to confusion :

A text must be accepted as it is and should be interpreted according to its tenor: यथावचनं हि वाचनिकम् ।

A far-fetched interpretation is allowable only when supported by authority (Kumarila Bhatta).

प्रमाणवन्त्यदृष्टानि कल्प्यानि सुबहून्यपि ।

The popular meaning of words should be preferred (Kumarila Bhatta).

सिद्धानुगममात्रं हि कर्तुं युक्तं परीक्षकैः ।

न सर्वलोकसिद्धस्य लक्षणेन निवर्तनम् ॥

A word employed once cannot bear the literal and metaphorical sense at the same time (Dayabhaga III. 2-30) सकृच्छ्रुतस्य मुख्यगौणत्वानुपपत्तिः ।

Multiplicity of sense must not be attributed to any word (Adhikarana Kaumudi 50) अनेकार्थताकल्पना ।

When there is an express text, considerations of reason are of no avail (Jaimini IV. 2-41) वचने हि हेत्वसामर्थे ।

Jimutavahana's rule that where no difference is found in the Sastras, equality is the rule समस्यादश्रुतत्वादिशेषस्य, has been applied in

4. ('32) 19 A I R 1932 All 417 : 138 I C 561 : 54 All 698 : 1932 A L J 538 (F B), Gajadhar Prasad v. Gauri Shankar.

the case of daughter's sons and illegitimate sons of Sudras when there are legitimate daughters, etc. Raghunandana in the *Udva-hatatva* gives the rule that what has been enjoined to be done need not be performed twice : सकृत् कृते कृतः शास्त्रार्थः

The opinion of another (book of authority) is accepted where it is not contradicted (Apastamba) अप्रतिषिद्धं परमतमनुमतम् । This principle is of utmost importance as it would bind the Bengal school with the rules of the Mitakshara on which that school is silent and at the same time would make the theory of spiritual benefit applicable to the Benares school when it does not clash with the rules of the Mitakshara.

In interpreting the rules of succession the question is whether the order of heirs mentioned in a text is to be settled by the *Kramas* or orders. They are three: (i) *Srutikrama* or the order laid down in an express text of the Veda; (ii) *Arthakrama* or the order determined according to the sense of the passage; (iii) *Pathakrama* or the order according to the words of the text. The commentators have construed the *Krama* in this connexion as *Arthakrama*.

There is also the principle of deducting by analogy (*Atidesa*) from texts dealing with one subject, applicable to another subject of the same class when there is no impediment. There cannot be an *Atidesa* upon an *Atidesa*, a remote analogy upon a remote analogy or a fiction upon a fiction (43 Cal 944¹ at page 966).

An enumeration of persons or objects may be illustrative and not exhaustive.

These principles are commonly found in other systems too.

There are many rules and principles which are peculiar to the Mimansa system of law; some of the instances are given below:

When a text forbids an act, the permission to do it by another may be presumed and therefore it is optional : प्राप्तिपूर्वको हि प्रतिषेधो भवति (तस्मादिकल्पः). Whether an injunction is optional or not, a commentator may thus always declare it to be so.

The artificial ways of interpreting particles like *api* अपि (even), *va* वा (or) and *cha* च (and) for deducing new rules are peculiar to the Mimansa. Some such rules have also been given by Dr. Siromony:

(1) If two reasons are given in the same clause for any particular proposition the reason last given is by way of *Sadhaka* or additional support and may be rejected. (2) When in order to establish

any particular proposition several reasons are given in successive clauses, each successive reason being preceded by such words as *Kinch* किञ्च, *Yadva* यदा, etc., then the reason last given is to be accepted as the correct one. (3) When several alternatives are proposed or propounded in the same sentence with the word *va* वा (or), it is to be understood that the author does not approve of any of them.

The popular maxims (*Laukikanyayas*) like the maxim of the staff and the cake or the maxim of the cattle and the bull or the *Matsyanyaya* or the maxim of the bigger fish eating the smaller fish which is the basis of Kautilya's *Arthashastra*, are not of Jaimini but have been so held by popular recognition.

Renowned Hindu jurists differ in the application of Mimansa principles and arrive at different conclusions on important crucial points: viz., on the point whether property or ownership is temporal or spiritual, Vijnaneswara (I. 1. 10) holds that it is by popular recognition by applying the *Lipsa Sutras* of Jaimini as interpreted by the heterodox Guru Prabhakar, while Jimutavahana (Ch. I) is of a contrary opinion by the application of the fundamental precept—*Swargakamo Yajeta*.

As regards the adoption of a daughter's or a sister's son, Nilakantha and Jimutavahana give opposite results; also as to the interpretation of the word 'parents' in the text of Yajnavalkya. Vijnaneswara prefers mother to the father in the succession to an issueless person by the application of his own grammatical rules of construction while Smritichandrika and Jimutavahana give a contrary result by applying Mimansa and other rules and prefer father to mother. Madhava holds that both should share the estate.

The Mimansa rules abound in such instances and they show the intricacies and difficulties as to the application of the Mimansa rules and also the logical subtlety and discrimination of the Hindu jurists.

Jaimini's rule as to assignment of reason once assumed great importance in connexion with the interpretation of the text of Vasistha: "Let no man give or receive an only son, since he must remain to raise up a progeny for the obsequies of ancestors." Mandlik (p. 499) says:

It is a rule of the *Purva Mimansa* that all the texts supported by the assigning of a reason are to be deemed not as *Vidhi* (an injunction) but simply as *Arthavada* (recommendatory). When a text is treated as an *Arthavada*, it follows that it has no obligatory force whatever.

Their Lordships of the Privy Council held it as not binding and remarked in connexion with Jaimini's rule :

That, if sound, would be conclusive as to Vasistha's text. But it is *rather startling*, and a very intimate acquaintance with the Smritis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may however fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command, but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience (26 IA 113, 146 : 21 All 460.⁵)

The doubt expressed by their Lordships of the Privy Council as to the meaning of Jaimini's rule is not without justification. The Mimansists explain that the rule relating to the descriptive clause in the shape of reason distinguishes an *Arthavada* or recital from a *Vidhi* or an imperative rule of law and that it only implies that the reason should not be taken as an essential part of the *Vidhi*, the obligatory nature of the *Vidhi* text remaining unaffected by the *Vidhi*, but neither a good nor an indifferent reason has any effect on it. Dr. Ganganath Jha says that the principle deduced under the *Hetuvannigadhadhikarana* is that :

When an injunction is followed by the statement of reason—this statement of reason has no mandatory force ; certainly this does not vitiate the mandatory nature of the injunction itself.

Vijnaneswara commenting on the text of Yajnavalkya which prohibits the marriage of a Sudra woman with a Brahmin, giving the reason—'Because out of her he is himself born,' says :

Here by assigning the reason that, out of her he is born himself, the author prohibits a marriage with a Sudra woman for one who is desirous of begetting a *Naityaka* (necessary) son, thus giving full effect both to the reason and the *Vidhi*.

5. ('99) 21 All 460 : 26 I A 113 : 22 Mad 398 : 7 Sar 330 (PC), Gurulingaswami v. Ramalakshamma.

Kishori Lal Sarkar (pp. 175-83) setting out the Sutra, explains that the rule relating to the descriptive clause in the shape of reason distinguishes an *Arthavada* or recital from a *Vidhi* or an imperative rule of law and that it only means that the reason should not be taken as an essential part of the *Vidhi*, the obligatory nature of the *Vidhi* text remaining unaffected by the assignment of reason. Madhavacharya treats an uncontradicted *Arthavada* as equivalent to a *Vidhi*.

Mimansa rules may be said to be of doubtful utility in the present-day administration of Hindu law as they have been applied *in extenso* in the interpretation of Hindu law. Many of the rules are a duplication of common sense or trained reasoning. Practically, all the difficulties due to conflicts, obscurities and *lacunae* in the Smritis have been more or less removed by the Commentaries and Digests and the decisions of British Indian Courts. Moreover, any fresh interpretation of the Smritis without the aid of the established Commentaries and Digests by an independent application of the Mimansa rules would be very risky. But whatever may be the extent of the utility, this subject is of utmost importance for a sound study of Hindu law.

The author would close this article with the text of Vrihaspati : "Decision should not be based only on the Sastras. *By an unreasonable judgment there is loss of Dharma.*"*

केवलं शास्त्रमाश्रित्य न कर्तव्यो हि निर्णयः ।
युक्तिहीने विचारे धर्महानिः प्रजायते ॥

* This is important in connexion with the enforcement of the strict letter of the rules of ancient law in modern days and lays down that a rule of law should be interpreted on the principles of justice, equity and good conscience.

REVIEW

Women Under Hindu Law (Need for Reform), by V. SURYANARAYANA RAO, B.A. M.L., Nizamshahi Road, Hyderabad (Deccan). Copies can be had from The Deccan Chronical Kingsway, Secunderabad; Shahra-e-Osmani, Hyderabad. Pages 33. Price Annas 8. Post free.

This is a short essay dealing with certain

problems now confronting the Hindu society and its women. The author has pointed out the adaptability of the ancient Hindu law texts for reform to suit the needs of the present day and made important suggestions as regards the rights of women regarding inheritance and divorce. The book is bound to be useful to the social workers and legislators.

Its origin, growth and decline in England, and its application to India

by Mr. RAJ KISHORE PRASAD, M.A. B.L. (First Class), *Advocate, Federal Court of India, and Patna High Court, Patna; Professor, Government Law College, Patna, etc.*

IN ENGLAND.

Ancient Law.—The Common Law Doctrine that the master answers for the tortious



acts of his servants, whilst acting under his general authority for his benefit, is a very ancient one. This principle is often shortly expressed by the words "*respondeat superior*," the superior must be responsible; but its meaning is more clearly shown in the maxim "*qui facit per alium facit per se*," a terse method, as it is sometimes called, of declaring the doctrine that he who acts by means of another, shall, as regards damage resulting from the manner in which the act is done, be deemed to have done it himself. Its first judicial enunciation probably cannot be traced. But the above principle was fully acknowledged so long as the time of Henry IV; but was even at that early time subject to the qualification that the act, for which the master was to be held liable, must be an act within the general scope of the servants' authority: see Y. B. 2 HY. IV. 18.

Origin.—The greatest blow, however, to the above Common Law Doctrine, also called "*Doctrine of Respondeat Superior*," that the master is responsible for the acts of the servants, was dealt by a decision of

the Court of Exchequer in the year 1837, in the much discussed case in (1837) 3 M & W 1.¹ This case decided that the rule expressed by the maxim "*qui facit per alium facit per se*," a rule of general application to most other relationships, should, nevertheless, not apply to the relationship of master and servant, in such a manner as to fix the master with liability to his servants for the acts of fellow servants. Thus became established what has become known as the "*doctrine of common employment*."

Growth.—This principle of common employment first established and introduced in 1837 by a judgment of Lord Abinger in (1837) 3 M & W 1¹ was no sooner expounded than it was universally accepted as a fundamental principle of law, not only in England, but in Scotland, and the United States of America as well. The above doctrine again came up before the Courts of England in (1850) 5 Ex 348,² when it was definitely formulated. It therefore originated in the Court of Exchequer and it was developed later by the same Court. In delivering judgment, Alderson, B. says:

They (i. e., the servant causing and the servant suffering the injury) have both engaged in a common service, the duties of which impose a certain risk on both of them and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew when he was engaged in the service that he was exposed to the risk of injury, not only from his own want of skill and care, but also from the want of it on the part of his fellow-servants; and he must be supposed to have contracted on the terms that as between himself and his master, he would run this risk.

In the year 1858, however, this doctrine of common employment was firmly and finally established in (1858) 3 Macq 266.³ The

1. (1837) 3 M & W 1 : M & H 805 : 7 L J Ex 42 : 1 Jur 937, *Priestly v. Fowler*.

2. (1850) 5 Ex 348 : 19 L J Ex 296 : 6 Rally Cas 580, *Hutchinson v. York, New Castle and Berwick Ry. Co.*

3. (1858) 3 Macq 266 : 4 Jur (N S) 767 : 6 W R 664 : 111 R R 896, *Bartonhill Coal Co. v. Reid*.

decision of the House of Lords in the above case³ gave final authority to it. It affirmed the doctrine of common employment as part of the Common Law of England. Lord Cranworth in delivering judgment, after two years' consideration, thus sums up the law on the subject :

When several workmen engage to serve a master in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.

The observations made by Lord Watson in (1891) A C 371⁴ that

the principle of the master's immunity in such cases, frequently termed the *doctrine of collaborateur*, is of comparatively recent origin. In the law of England it can hardly be traced further back than (1837) 3 M & W 1¹ which was decided in 1837. It was rejected by the Courts of Scotland until 1858, when for the first time in either country, it was fully explained and reduced to its proper limits by Lord Cranworth, in the Scotch case in (1858) 3 Macq 266.³ The doctrine had previously been formulated by the Supreme Court of Massachusetts in a judgment delivered by Shaw C. J., in (1858) 4 Met 49,⁶ which was referred to with approval by Lord Cranworth,

were quoted with approval in 1938 by Lord Thankerton in (1938) A C 57.⁶ A number of decisions given, since the case in (1837) 3 M & W 1¹ have carried the principle of common employment to an extent, logical, perhaps, but in practice inconvenient and even harsh. Speaking of the doctrine, Dr. Kenney in his *Select Cases on Torts* says: "Lord Abinger planted it, Baron Alderson watered it and the Devil gave it increase."

The doctrine. — The doctrine of common employment, therefore, may be enunciated as follows : If the person occasioning and the person suffering injury are fellow workmen engaged in a common employment and having a common master, such master is not responsible for the consequences of the injury. The rule is an application of the maxim '*volenti non fit injuria*,' which means that no act is actionable as a tort at the suit of any person who has expressly or impliedly assented to it, because no man can enforce a right which he has voluntarily waived or abandoned. The rule applies even though the servant injured is a child. This

doctrine is a well-known defence, or rather one of the defences, open, of course, to an employer only, when it is sought to make him liable to one servant for the acts of another servant.

Conditions of applicability. — Two conditions, however, must be fulfilled before this rule of exemption from liability is applicable : "there must be both common employment and a common master," as observed by Brett L. J. in (1878) 3 Ex D 341.⁷ The House of Lords, by its decision in (1891) A C 371,⁴ has established that the view of Brett L. J., was the right one, and for the doctrine of "Common Employment" to apply it is not sufficient that the workmen are engaged in a common work, they must in addition, have a common employer. In other words, the servant injured and the servant causing the injury must be fellow servants, i. e., they must be servants of the same master, meaning thereby a common master; and they must at the time of the accident have been engaged in a common employment, that is to say, jointly in the same employment.

The terms. — The terms 'fellow servants' and 'common employment' need some elucidation.

Fellow servants. — All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellow servants in a common employment. Servants are fellow servants within the meaning of this rule even though one of them is the superior of the other if they are in the employ of a common master, because the superior servant is in such a position that he becomes the *alter ego* of the master. It is not enough that they were working together and engaged in the same work or transaction, working side by side, unless with respect to that work or transaction they were employed by the same master. The term fellow servant also includes any person who, on his own initiative or at the request of a servant or his master, gratuitously and temporarily assists the servant in his work. By such assistance he puts himself *quoad hoc* in the position of a fellow servant of the servant assisted by him. He is not considered to be in a position of a servant *pro tempore*.

Common employment. — Servants are in common employment when they are engaged in a common object, namely the furtherance of the business of their master,

4. (1891) 1891 A C 371 : 61 L J Q B 90 : 65 L T 97 : 40 W R 405 : 55 J P 644, *Johnson v. Lindsay & Co.*

5. (1858) 4 Met 49 : 3 Macq 316 : 149 R R 262, *Farwell v. Boston and Worcester Railroad Corporation.*

6. (1938) 1938 A C 57 : 106 L J P C 117 : (1937) Sc L T 523 : 157 L T 406 : (1937) 3 All E R 628 : (1937) S C (H L) 46 : 53 T L R 944 : 81 S J 700, *Wilson & Clyde Coal Co. v. English.*

7. (1878) 3 Ex D 341 : 47 L J Ex 372 : 38 L T 201 : 26 W R 413, *Swainson v. N. E. Ry. Co.*

and that not the common immediate object, but the ultimate object, is the test. The employment must be common in the sense that the safety of one servant must in the ordinary and natural course of things depend on the care and skill of the others. It is not meant by this that their work must be identical in nature. Employments are said to be common within the meaning of this rule when they are so connected with each other that the risk of an accident due to the conduct of one of them is a natural incident of the other, so that such risk must be deemed to have been in the contemplation of the servant when he undertook that other.

Where, therefore, servants, are engaged in different departments of duty, an injury committed by one servant upon the other, by carelessness or negligence in the course of his peculiar work, is not within the exception, and the master's liability attaches in that case in the same manner as if the injured servants stood in no such relation to him, as said by Lord Chelmsford in the leading case in (1858) 3 Macq 266³ when considering what was meant by the words 'common service' or 'common employment'. Lord Wright in (1939) A C 215⁸ in explaining what was meant by 'common work' said that it was work which necessarily and naturally, or in the normal course, involves juxtaposition, local or casual, of the fellow employees, and exposure to the risk of negligence of one affecting the other.

The case in (1894) A C 222⁹ shows that difference in grade and responsibility does not exclude the doctrine so long as the nexus exists.

Therefore, as before stated, it is not necessary for the defence of common employment to apply that the workmen should be engaged upon the same or similar work, or indeed at the same place. On the other hand, the mere association of workmen in a common employment, no matter how closely related the conditions under which it is necessarily carried on, does not subject them to the disadvantages of the doctrine, unless they are in the service of a common master. It is the relationship to the one master, and not the association in a common work, which produces the disqualification.

Limitations on application.—But the doctrine does not apply to (1) statutory obligations imposed upon masters as under the Factory Acts, (2) where the master has been guilty of negligence in selection of the fellow

servant causing the injury, (3) where the injured servant is bringing his action, not against the master but against the servant whose negligence or other wrongful act was the cause of the injury in question: see (1911) A C 5,¹⁰ (1912) A C 149,¹¹ (1912) A C 693,¹² (1934) A C 1¹³ and A I R 1940 P C 225.¹⁴ Lord Wright in the last case further said as follows:

In addition the doctrine does not apply to claims by workmen for injuries caused by breaches of statutory duties imposed for their protection or for breach of duties personal to the employer.

Reasons underlying.—This principle of exemption of the master from liability has been defended upon many grounds, the most usual one being that the workman has made an implied contract with his master to take the risks of the employment, including the risk of injury caused by his fellow workmen. In other words, that a servant impliedly agrees to run the risk naturally incident to the employment undertaken by him and that one of these risks is that of harm due to the negligence or incompetence of his fellow servants.

It is, however, not difficult to discover the unsoundness of such a system of reasoning. The workman makes no contract to take the consequences of the negligence of his fellow workmen and he would be generally very unwilling to do so. The only ground for implying such assent is, that he has entered into association with others upon work, in the course of which he knows there is risk of injury arising from the negligence of those with whom he thus places himself in contact. If from this knowledge of risk a contract to exclude the principle of *respondeat superior* is to be implied, then it should be implied in the case of passengers upon railways and other public conveyances, and indeed, in the case of everyone who voluntarily subjects himself to the ordinary dangers of street traffic: see Rueggs' Employers' Liability & Workmen's Compensation, Edn. 8.

Decline.—The doctrine of common employment, stated to have been "erected on

10. (1911) 1911 A C 5 : 80 L J K B 135 : 103 L T 467 : 55 S J 44, Lees v. Dunkerley Bros.

11. (1912) 1912 A C 149 : 81 L J P O 97 : 106 L T 161 : 28 T L R 150, Butler v. Fife Coal Co.

12. (1912) 1912 A C 693 : 81 L J K B 1056 : 107 L T 321 : 28 T L R 569 : 56 S J 719, Watkins v. Naval Colliery Co.

13. (1934) 1934 A C 1 : 102 L J P O 123 : 149 L T 526 : 77 S J 589 : 49 T L R 566 : (1934) Sc L T 114 : (1933) Wc & I Rep 318 : (1933) Sc (HL) 64, Lochgelly Iron & Coal Co. v. M' Mullan.

14. ('40) 27 AIR 1940 P C 225 : 191 I O 229 : I L R (1940) Kar P O 485 (P O), T. & J. Brockle Bank Ltd. v. Noor Ahmode.

8. (1939) 1939 A C 215 : 108 L J K B 320 : 160 L T 420 : 83 S J 887 : 55 T L R 459 : (1939) 1 All E R 637, Radcliffe v. Ribble, Motor Services Ltd.

9. (1894) 1894 A C 222 : 63 L J Q B 419 : 6 R 106 : 70 L T 680 : 42 W R 497 : 7 Asp M O 488, Hedley v. Pinkney & Son's Steamship Co.

the foundation of general policy and judicial reasoning," however, caused much dissatisfaction in England. In 1877 a Bill providing for the total abolition of the doctrine of common employment was referred by the House of Commons to a Committee which, however, were unable to recommend the abolition of the doctrine of common employment; but, nevertheless, they recommended alterations. Acting upon this report, the Government in 1879 introduced a Bill which was however soon withdrawn. In 1880 the Government brought in the Bill, which has been in force as a statute since the first day of January 1881, under the name of "Employers' Liability Act, 1880." In introducing the Bill it was stated that the object of the Government was "to bring back the law to what it was supposed to be in England before the case in (1837) 3 M & W 1,¹ and in Scotland up to the decision in (1858) 3 Macq 266³: *vide* Rueggs' Employers' Liability & Workmen's Compensation, Edn. 8.

The Employer's Liability Act was passed to obviate the injustice to workmen that employers should escape liability where persons having superintendence and control in the employment were guilty of negligence causing injury to the workmen. The object of the Act was to get rid of the interference arising from the fact of common employment with respect to injuries caused by any person belonging to the specified classes. The Act was enacted for seven years, but has since been continued from time to time, by being inserted annually in the Expiring Laws Continuance Act. This Act, however, has not in any way affected the application of the maxim '*volenti non fit injuria*.' This Act, though still on the Statute book, is practically obsolete, having been superseded by the Workmen's Compensation Acts, 1897 to 1925, because since the passing of the Workmen's Compensation Acts proceedings have seldom been taken under the Employers' Liability Act, 1880. This Act does not abolish the doctrine of common employment, but it gives a remedy by action for damages in certain specified cases to servants, not being domestic or menial servants, but engaged in manual labour, because the Act applies to workmen as defined by the Employers and Workmen's Act, 1875, and to railway servants, who are injured by the negligence of their fellow servants in the course of their employment. Similarly, the Workmen's Compensation Act does not abolish the doctrine of Common employment or repeal the

Employer's Liability Act, but it gives to all servants to whom it applies a statutory right to be compensated by their masters for accidents suffered by them in the course of and arising out of their employment, whether such accidents are caused by the negligence of a fellow-servant or not. The liability of the master has been considerably enlarged by the above enactments.

The Employers' Liability Act, 1880, has, therefore, modified the application of and made the first statutory inroad upon the doctrine of common employment and makes it unavailable to the master in certain cases; the Workmen's Compensation Act, 1925, which repeals the previous similar Acts imposes an entirely new obligation on the master, wholly unconnected with his Common law liability and totally independent of it, to compensate a workman for any injury he sustains in his employment if the injury incapacitates him totally or partially from work.

Present Law.—We, therefore, find that the well-known defence of common employment, under which rule at Common law a master is never liable to one servant for the injuries or damage sustained through the negligence of a fellow-servant, unless, the master expressly authorises the wrongful act or personally interferes and makes the act his own has been to a large extent abrogated by statute—the Employers' Liability Act, 1880, and the Workmen's Compensation Acts, 1897 to 1925—but as these Acts do not apply to all forms of employment, the Common law principle is, therefore, still applicable in many instances. In 1934 also, a Bill was introduced to abolish the defence of common employment in the House of Commons, and referred to a Standing Committee, but to no effect. Speaking of the doctrine of "common employment" Lord Atkin in (1939) A C 215,⁹ observed that :

At the present time this doctrine is looked at askance by judges and text-book writers. There are none to praise, and very few to love. But it is too well established to be overthrown by judicial decision. Affirmed by several decisions of this house, it has been accepted, by the Legislature, once expressly in the Employers' Liability Act, 1880, and subsequently as the foundation underlying the various Workmen's Compensation Acts.

It is therefore that Salmond observes that:

It is irrational, and it is to be regretted that the Legislature has not seen fit wholly to abolish it, instead of merely establishing a series of capricious exceptions to it.

IN INDIA.

Principles to be followed. — In India, where there is no legislation analogous to the Employer's Liability Act, 1880 and where before 1924 there was no Workmen's Compensation Act like the similar Act of England, and where even today in cases to which the Workmen's Compensation Act, 1925, does not apply, the question which arises for consideration is whether to such cases the Courts should apply the Doctrine of Common Employment of England or not. The rule that has been generally followed in such cases is that the Common law of England which represents justice, equity and good conscience should be applied where there is no provision to the contrary. The Common law followed in India is the unwritten law of England : see AIR 1921 Cal 1,¹⁵ A I R 1922 Pat 104¹⁶ and A I R 1933 Pat 35.¹⁷ Sir Barnes Peacock C. J. in 9 W R 230¹⁸ stated the law as follows :

Now, having to administer equity, justice and good conscience, where are we to look for the principles which are to guide us? We must go to other countries where equity and justice are administered upon principles which have been the growth of ages, and see how the Courts act under similar circumstances; and if we find that the rules which they have laid down are in accordance with the true principles of equity, we cannot do wrong in following them.

This principle was adopted by their Lordships of the Privy Council in 14 I A 89.¹⁹ Lord Hobhouse in delivering the judgment stated that :

The matter must be decided by equity and good conscience, generally interpreted to mean the rules of English law if found applicable to Indian society and circumstances.

This principle has more recently been affirmed by their Lordships in 57 I A 168.²⁰ The question therefore is whether this doctrine of common employment, which, although subjected to an unusual amount of criticism and largely abrogated in England, but still part of the Common law in England, is in accordance with the principles of justice, equity and good conscience so as to be applicable to India.

15. ('21) 8 AIR 1921 Cal 1 : 59 I C 143 : 22 Cr L J 31 : 48 Cal 383 : 32 O L J 94 : 24 O W N 982 (SB), Satish Chandra v. Ram Dayal.

16. ('22) 9 AIR 1922 Pat 104 : 66 I C 861 : 1 Pat 371 : 3 PLT 276, Jagat Mohan v. Kali Pado Ghosh.

17. ('33) 20 AIR 1933 Pat 85 : 141 I C 133 : 11 Pat 698 : 14 P L T 279, Ramkirat v. Biseshwar Nath.

18. ('68) 9 W R 280 : Beng L R Sup Vol 938, Digumburee Dabee v. Eshan Chandra Sein.

19. ('87) 11 Bom 551 : 14 I A 89 : 5 Sar 16 (P O), Waghela Rajsanji v. Sheikh Maaluddin.

20. ('80) 17 AIR 1930 P O 142 : 128 I C 554 : 11 Lah 251 : 57 I A 168 (P O), Mehrban Khan v. Makhana.

ENGLISH COMMON LAW
NOT APPLIED.

The Courts in India, have on several occasions, refused to apply a rule of English law on the ground that it is not applicable to Indian Society and circumstances. A number of rules firmly established in English law have been departed from in India. Many Judges have refused to apply them here. For examples 55 Mad 727;²¹ 51 Bom 167;²² 46 ALL 860,²³ the rule in (1861) 30 L J Q B 265.²⁴

DOCTRINE APPLIED.

The contention that the rule of common employment was not an equitable one was raised and expressly dissented from in 9 A L J 173,²⁵ in which Richards C. J. observed that there being no such statute (meaning Employers' Liability Act, 1880), in India, the doctrine of common employment must be applied in all such cases. This rule has been followed also in A I R 1933 Sind 129²⁶ and in *Turner v. S. P. & D. Ry. Co.*, an unreported case, referred to in Alexander's Indian Case Law on Torts. But on an examination of the judgments in the aforesaid cases and the other cases in which this rule has been applied it would appear that in all these cases it was assumed that because the doctrine is still part of the Common law of England it necessarily applies in India, and the question whether the rule of common employment is founded on any principles of justice, equity and good conscience was not examined at all.

DOCTRINE NOT APPLIED.

In A I R 1937 Nag 354,²⁷ however, on difference between Niyogi and Staples A. J. Cs., Stone C. J. and Pollock J., held that the doctrine is not, under the conditions of to-day, in accordance with the principles of justice, equity and good conscience; and, therefore, the extension of such a doctrine

21. ('32) 19 AIR 1932 Mad 445 : 140 I C 422 : 62 M L J 608 : 55 Mad 727, Narayana Sah v. Kannamma Bai.

22. ('27) 14 AIR 1927 Bom 22 : 98 I C 949 : 51 Bom 167 : 28 Bom L R 1334, Hirabal Jehangir v. Dinshaw Edulji.

23. ('24) 11 AIR 1924 All 857 : 46 All 860 : 22 A L J 788, Sheoratan Singh v. Karan Singh.

24. (1861) 30 L J Q B 265 : 1 B & S 393 : 8 Jur (N S) 332 : 4 L T 468 : 9 W R 781, Tweddle v. Atkinson.

25. ('12) 9 A L J 173 : 13 I C 417, Blanchette v. Secretary of State.

26. ('33) 20 AIR 1933 Sind 129 : 143 I C 334 : 26 S L R 282, Abdul Aziz v. Secretary of State.

27. ('37) 24 A I R 1937 Nag 354 : 174 I C 401 : I L R (1938) Nag 54, Secretary of State v. Rukhminibai.

of English law is unsuitable to conditions in India. The Allahabad case and the Sind case referred to above were considered in the Nagpur case and were not followed. It would be useful to know the reasons which led three of the Hon'ble Judges to take the above view, and, therefore, I quote below in *extenso* portions of the judgments of each of them. In the above case, Niyogi A. J. C., observed as follows :

It must be noticed that this rule was introduced as an exception to the maxim of *respondeat superior* which itself is an exception to the rule of law that a fault binds its own author (*culpa tenet suos auctores*). An exception has been introduced to the doctrine of common employment by the Employer's Liability Act passed by the Parliament in 1880. The rule of common employment, therefore, in so far as it has been abrogated by a statute cannot be treated as forming part of the enforceable Common law of England . . . , any Court in India which takes recourse to the Common law of England and seeks to apply its principles to India cannot afford to ignore the extent to which the Common law stands abrogated by statute . . . The position in England to-day is well stated in Halsbury's Laws of England, Vol. 20, p. 131, Art. 261, in these words :

"An employer sued by a servant in respect of injury incurred in the course of the employment may still set up as a defence the doctrine of common employment, save in so far as the doctrine is abrogated by the Employers' Liability Act, 1880."

It would be clear, therefore, that in cases indicated in the statute no employer is entitled to raise the defence of common employment; nor have the Courts of Common law any jurisdiction or power to entertain such a defence. It, therefore, appears to me that it is manifestly anomalous and illogical to apply, in the name of justice, equity and good conscience, to India the doctrine of Common law which is no longer regarded at its source as fair and equitable and enforced as such.

Pollock J., stated as follows :

In my opinion the rule, to use the words of Lord Herschell in (1894) A C 318,²⁸ (when considering whether the English case in (1799) 8 T R 186,²⁹ could be extended to Scotch jurisprudence), is not "founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries" . . . In the days when jobs were more plentiful and an employer had only a few servants, all of whom were acquainted with each other, such a presumption of law might perhaps be fairly made, but conditions have changed enormously since 1837. No such doctrine appears to exist in the law of any other country in Europe, and in my opinion the doctrine is not, under the conditions of to-day, in accordance with the principles of justice, equity and good conscience.

The Royal Commission on Labour in India . . . in their report of 1931, . . . was dealing with the

conditions of labour in India and their opinion that these defences are inequitable must be interpreted as meaning that the defences would be inequitable in India. The opinion of such an authoritative body, of which I take judicial notice, must inevitably carry very great weight, and on this ground I am of opinion that the extension of such a doctrine of English law is unsuitable to conditions in India.

Stone C. J. said as follows :

If the history of the rule be examined, it will be found that in some cases stress is placed upon the rule known as "*volenti non fit injuria*." Sometimes stress is placed upon a supposed implied term in the contract of service. It will be found that in its first enunciation it was supported by reasons which, as Scrutton L. J., observes at page 315 of (1932) 2 K B 309,³⁰ were not satisfactory, and was placed on a ground substantially different from that eventually adopted. It will also be seen that in the end the rule imported a fiction. . . . A great American jurist, O. W. Holmes, in his work on the Common Law has observed: 'The law is always approaching and never reaching consistency. It is for ever adopting new principles from life at one end, and it always retains old ones from history at the other which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow.' In my opinion this rule has its roots in history. . . . It was and is firmly engrafted on to the English Common law. But when one in India considers whether a particular branch of the English Common law should here be applied, one has to ask oneself whether it is, . . . "in accordance with justice, equity and good conscience", and one has, in considering that question, to consider the age in which the application is to be made. Things have been part of the English Common Law which are not consonant to modern ideas of justice and on which, had a Judge in England to consider the matter now free from authority, a different conclusion would unquestionably be arrived at to what was arrived at in the 15th, 16th or 17th centuries. Since the rule in (1837) 3 M & W 1¹ was formulated, the world has undergone great changes. . . .

In so far as the doctrine of common employment is founded on the maxim *volenti non fit injuria*, it appears to me to be a rule which is consonant to justice, equity and good conscience. If it can be shown as a fact that the man knew of the risk and voluntarily ran the risk, then it may be right and proper that he should be denied a remedy. . . . But by a fiction to compel a Court to assume what is obviously not the case that a man employed by an employer who is employing all kinds of people in all kinds of occupations over a whole continent has contracted to run the risk of the negligence of all people, however different their employment, however disconnected their employment may be, is in my opinion a rule that has to be critically examined. . . . It is true that in considering what the Common Law of England is, one has not to look at the Statute Law of England; but the law of England is composed of both, and one seeks guidance when determining what is justice, equity and good

28. (1894) 1894 A C 318 : 6 R 245 : 71 L T 163, Palmer v. Wick Steamshipping Co.

29. (1799) 8 T R 186 : 16 R R 810, Merryweather v. Nixan.

30. (1932) 2 K B 309 : 101 L J K B 641 : (1932) Wo. & I Rep 149 : 147 L T 243 : 48 T L R 433, Fanton v. Denville.

conscience not by looking at a particular branch of the law in England, but by looking at what is the law of England at present in force, and even then one is not compelled to apply that law unless one is of the opinion that bearing in mind the circumstances as existing in India today, that law can according to justice, equity and good conscience be here applied . . . When one finds it criticised by a competent jurist in the country of its origin and followed not because of its infrangible logic but because of its authority, an authority derived from an earlier age when circumstances were different, one is also justified in treating it as an unsafe guide.

DOCTRINE'S APPLICATION DOUBTED.

Very recently in July 1940, their Lordships of the Privy Council had to consider the applicability of the Doctrine of Common Employment to India, and although they did not decide it expressly, yet the strong observations made by them in course of their judgment delivered by Lord Wright in A I R 1940 P C 225¹⁴ on an appeal from Calcutta, quoting with approval the case of the Nagpur High Court referred to above leaves no room for doubt that the view taken by the Nagpur High Court is the correct view of the law on the point so far as India is concerned. Lord Wright stated as follows :

But there is a serious question whether the doctrine of common employment is part of the law of India. It has been severely criticised in England by many high judicial authorities, as for instance, in (1939) A C 215⁸, 1938 A C 57⁶ and in many other judgments. It has indeed in England only been made endurable by reason of legislative measures . . . These measures have made the doctrine of common employment less objectionable in England.

Questions have been raised whether a doctrine so unsatisfactory both as to its policy and as to its practical results ought to be followed at all or at any rate without qualifications by the Indian

Courts as a part of the law of India, particularly when in England it has been qualified and largely abrogated by legislation which has no counterpart in India. Thus in A I R 1937 Nag 354²⁷ Stone C. J., in the Nagpur High Court, refused to apply it. It may further be observed that the fiction of an implied contract has always been regarded as difficult. . . .

For the first time in India a Workmen's Compensation Act much similar to the Workmen's Compensation Acts of England, was passed on 5th March 1923 as Act 8 of 1923, which came into force on the first day of July 1924. This Act provided for the payment by certain classes of employers to their workmen of compensation for injury by accident. The terms 'employers' and 'workmen' have been defined in S. 2 read with Sch. 2 of the Act from which it would appear that the Act applied to railway servants or other persons employed for the purposes of the employer's trade or business. This Act has been amended subsequently in 1924, 1925 and 1933. But this Act does not cover all classes of master and servant.

CONCLUSION.

The principle, therefore, which emerges from the foregoing discussion is that the Doctrine of Common Employment has no application to India even to cases which are not covered by the Workmen's Compensation Acts 1923-33. In India, therefore, the maxim *respondeat superior* is still applicable and a master remains liable to his servant for the injury or damage done to him due to the negligence of his fellow servant. If a servant has been temporarily lent to another master, the law is that in such a case it is the '*patron momentanel*' and not the '*patron habitual*' who is responsible.

JAINA LAW

by C. R. JAIN, (RETIRED) BAR-AT-LAW, 19F, Connaught Place, New Delhi.

In the case of *Bhikubai Chunnilal Ambaidas v. Manilal Bhagchand Raychand* reported in A I R 1930 Bom 517 especially at p. 519 the Bombay High Court has held as follows :

It appears . . . from verse 24 of the Vardhman Niti, that the widow should maintain her relatives, and for religious and communal purposes she may sell or mortgage the property. This verse is inconsistent with verse 14 which states that the widow has full powers like the husband whether there is a son or not. Verses 51 and 52 of the Arhan Niti would show that when there is a legitimate son or a well behaved adopted son or when there are none, she i. e., the widow, may for neces-

sary purposes make a gift or mortgage or sale of the property in her charge. Verse 76 of the Arhan Niti says that if the widow is perverse and of evil conduct she should be expelled by the husband's brothers and their sons after making settlement for her maintenance, and verse 112 says that when the son dies sonless, his estate is taken by the widow, and on her death is taken by her mother-in-law. The above mentioned verses are somewhat inconsistent with verses 115 and 116, which ordain that on the husband dying sonless the widow is the mistress of all his property. Similarly, in Bhadrabahu Samhita, verses 61 and 65, seem to be apparently in conflict with verse 110.

This decision was accepted by the Lahore High Court in a case which is reported in

A I R 1932 Lah 546,¹ but apparently without an examination and full analysis of the provisions of the verses mentioned in the Bombay ruling. It seems to me and I submit it with the greatest deference to the learned Judge whose views have been quoted verbatim above that the verses in question do not bear the interpretation that has been placed on them and are in no sense inconsistent with one another. I give below the reasons that have led me to this conclusion.

First of all as regards the two verses from the Vardhmana Niti. The 14th lays down the general rule that the wife takes the estate of her husband in preference to the son and has full powers of disposal over it. This relates to a case of succession pure and simple. Verse 24, if read carelessly and apart from the preceding three verses in the same book, may at first sight appear to conflict with this rule, but not when read in its proper place in the sequence of verses beginning with the 20th which authorizes the making of a trust in certain cases when a person wishes to make better provision for his family. This he does by means of a deed in writing. Verses 21 to 23 relate to the carrying out of this deed: the executant is dead, the trustee is in possession, the estate is being mismanaged. What is the remedy? "Taking the writing" herself the widow of

the executant should with her exertion "protect the property left by her husband." It is evident that she has not succeeded to the estate as an heir to her husband, but has merely placed herself in the position of the deposed trustee. Now comes verse 24 which reads:

With it she should maintain herself and the family. For religious and communal purposes she may sell or mortgage the property.

The powers of a trustee are never absolute. He can only alienate the property in certain conditions; an absolute owner may do what he or she pleases with it at any time, at all times. Thus, there is really no conflict between the provisions of these verses. The same is the case with verses 51, 52 of the Arhan Niti which, when read with verses 46 to 50, cease to appear to be conflicting with the general rule of succession that the widow takes her husband's estate absolutely. These verses also provide for the making of a trust and the appointing of a trustee-manager in writing by a person for the preservation of his estate, and further lay down:

If the manager, on the death of the owner, wastes the wealth placed in his charge by the owner, or becomes antagonistic to the widow of the deceased, then the widow should dismiss such an ungrateful proud man with the permission of the king and should carry on the work according to the practice of the family with another person trusted by her.

(To be continued.)

1. ('32) 19 A I R 1932 Lah 546 : 139 I C 721 : 14 Lah 95 : 33 P L R 801, Lado v. Banarasi Das.

REVIEWS

The Indian Income-tax Law Year Book (1941-1942) by B. R. JAIN, *Editor of Income-tax Gazette*. Published by Income-tax Law Publishing House, Chandni Chowk, Delhi. Pages 644. Price Rs. 6.

This is an up-to-date commentary on the Income-tax Act. The author intends to bring out every year a new edition soon after the passing of the Finance Act and give the changes in the law, the case law and the departmental rules occurring in the course of the year. The book under review contains the entire law and case law and all rules and notifications amended up-to-date. We are sure the book will be found to be of great use to the legal profession and people connected with Income-tax law.

The Neighbour Rule in Tort Law, by E. KRISHNAMURTI, *Advocate, Vellore*. The book can be had from Messrs. P. Varadachari & Co., Linghi Chetty Street, George Town, Madras. Pages over 107, Price Rs. 2 only.

In this book the author has explained the legal principles clearly, concisely and accurately with reference to case law. The book is written in lucid style which makes it easy reading. We are sure the book will be enjoyed not only by students of law and practitioners but also by laymen. The printing and get up leave nothing to be desired and the price is moderate.

THE HON'BLE SIR IQBAL AHMAD
CHIEF JUSTICE, ALLAHABAD HIGH COURT.



Born in 1886 — Practised in Azamgarh from 1908 to 1912 and Aligarh from 1912 to 1914 — Practised in the High Court, Allahabad from 1914 to 1926 — Additional Judge from October 1926 to February 1928 — Acting Judge in June and July 1929 — Acting Judge from April 1929 to August 1932 — Additional Judge from October 1932 to April 1933 — Permanent Judge from 1933 to 1941 when appointed Chief Justice.

by C. R. JAIN, (RETIRED) BAR-AT-LAW, 13F, Connaught Place, New Delhi.

(Continued from page 80)

Now follow verses 51 and 52. The widow has placed herself in charge of the property with the aid of the King, and must have all the powers of the trustee manager, but not an absolute estate of inheritance under the general provisions of the Jaina law. She can now only make a sale or gift or mortgage of the property in her charge for a necessary purpose. Verse 76 of the Arhan Niti has nothing to do with the widow's power of disposal over her husband's estate. It is a disqualifying enactment; if she is disqualified for unchastity or otherwise she does not inherit her deceased husband's estate. As such, this verse cannot be deemed to be inconsistent with any other verse in the Arhan Niti or any other text. Verse 112 of that book contains a special provision for a special case. It has no other implication. It only applies if there are no other persons in the list of heirs than a widow and a mother. The widow takes the estate. And when she dies, and the estate is still in existence, it goes to her mother-in-law who takes it as her heir, not as an heir to her deceased son. The son's widow has full power over her estate, and she may deal with it as she likes under the general rule that she takes her estate as absolute owner. There is no conflict here also. The rule is like a decision in a special case that has become embodied in the text, and in no sense a provision of general applicability to the widow's estate in all cases.

The case with verses 115 and 116 is even clearer. They deal with a case of will. The widow has no son but a daughter; and there are in existence her husband's nephews. If she makes a declaration and appoints her daughter her heir, the estate would not go to her husband's nephews but to her own daughter, and on her death it would descend to her own heirs and not her father's. That the Jaina legislators provided for wills may seem strange to those who have not studied these ancient laws with adequate sympathy or respect, but these provisions leave no doubt that they not only made provisions for the making of wills but also for trusts: see the Jaina Law pp. 68, 81, 84, 101 and 200. I notice that Patkar J. himself was not quite sure in his mind that the provisions of the verses he noticed in his judgment were really inconsistent with each other; he merely says as to some of them

that they are "somewhat inconsistent." To come to verses 61, 65 and 110 of the Bhadra Bahu Samhita: the first of them merely states the obvious fact that the predeceased son's widow has no power to deal with the estate of her father-in-law, whether self-acquired or ancestral. Verse 65 adds that the widow of a person, whether his father be living or dead, inherits all his property, and exhorts her to live for some time with her mother-in-law and show her respect. This phrase is not restrictive of her rights of proprietorship in any way. It is a mere moral exhortation and only for "some time." This is made further clear by the two following verses which confer on her the absolute power to adopt a son to her deceased husband in doing which she cannot be obstructed by her mother-in-law. Verse 110 of the Samghita is exactly the same as 112 of the Arhan Niti which I have already shown to have no restricting power over a widow's full powers of alienation over what she has inherited from her husband.

It is true that the Hindu law is now being applied more and more in many places to the Jains; but, it is absolutely certain that the Jains had their own laws, and never voluntarily adopted the Hindu law at any time in the past. How they have come to be governed by the Hindu law in the British Courts is described in the Appendix to my Jaina Law, and it will not serve any useful purpose to reiterate it here once more. In the Bombay case Patkar J. also made the following observation about the position of the mother.

It appears from verses 11 and 12 of the Vardhaman Niti that a widow is not mentioned as an heir of her son. It is conceded before us that among Jains a widow is not entitled to preference over the sons at the present time, and that the mother is an heir. The verses, therefore, in the Vardhaman Niti and the other books relate to a condition of Jain society when the widow has been considered as a more preferential heir than the son, and cannot have a more binding force at the present time.

The mother is a sapinda according to the Jaina law and is included in the list of heirs as such. Hence, no specific mention is made of her separately in the Jaina law books. It is true that the Jaina law has now been thrown into a state of confusion within the last 50 years or so, but his Lordship's attention should have been drawn to its full provisions in any case.

Origin of the rule.—The subject of prohibited degrees in Hindu law of marriage like the law of joint family and inheritance depends on the tie of sapindaship. This tie is the keystone of the Hindu law of the joint family: 10 Bom L R 184.¹ Equally so it is of the law of marriage, for sapindaship for marriage and inheritance is co-extensive: 42 Cal 384.² The Hindus in ancient times lived in joint families for generations and sapindaship or identity of body was held to continue till seven degrees so that descendants of common ancestors in unbroken male lineage were all sapindas of each other. Accordingly those who were called upon to live together under the same roof were necessarily on social grounds, apart from any physiological reasons, restricted from entertaining the idea of marriage within that circle. These sapindas were also sapindas for purpose of mourning and eleven days pollution extended to them on the death of a fellow sapinda. It were they who were entrusted with the duty to offer pindas, oblations of food to the deceased or vested with the right of participation in oblations offered to common ancestors. In fact the right to inherit was co-extensive with the right or the duty to offer oblations. It was consequently monstrous to think of matrimony within this circle. No doubt, in course of time, the theory of the identity of body till the seventh degree was modified for the purpose of coparcenary when it was found convenient to live together for seven generations and the identity of body was held to extend only to four generations, so that a great-great-grandson was out of the coparcenary, 10 Bom H C R 444,³ but sapindaship under the Mitakshara continued till the seventh degree for the purpose of inheritance as well as for the purpose of marriage and mourning. In the Bengal school, the theory of sapindaship did not rest on the identity of body but on the right to offer pindas or funeral oblations. Accordingly, what were the propinquous sapindas of the Mitakshara, viz., the members of a smaller

coparcenary within four degrees were the agnatic sapindas of the Dayabhaga for inheritance, there being no coparcenary in the Dayabhaga system. The class of sapindas was further extended under this system by admission of certain cognates in the paternal lines within four degrees and in the maternal lines within five degrees. Sapindaship under the Dayabhaga was different accordingly as it was for marriage, mourning or inheritance. There was therefore necessarily some difference in the law of marriage under the two systems but practically much the same rules were evolved with some modifications. As the Hindu joint family was a relic of a larger joint family or a village community embracing sagotras or samanodakas, relations above the seventh degree as far as memory could go, and these were enjoined to observe three days mourning and participated in common oblations of water, interdiction as regards marriage within this larger circle survived as the relic of the rule of common gotra which is now known as the rule of exogamy.

Sapindaship extending to maternal lines is of later development in the Hindu law. The maternal relations within five degrees were enjoined to observe three days' mourning and were considered as bhinnagotraja sapindas by the Mitakshara for purposes of inheritance, mourning as well as marriage. This class also embraced male descendants through female descendants in the paternal lines. For the purpose of marriage, though the basic idea under the Dayabhaga system was entirely different, the prohibition of degrees resting on the same text too, was extended to cognates under practically the same rules deduced from them, with modifications.

Rules of prohibition.—We have therefore to consider two main rules deduced from the texts on the subject, viz., (1) the rule of common gotra and pravara called the rule of exogamy; (2) the rule of sapindaship leading to prohibited degrees.

RULE I. Rule of exogamy (common gotra and pravara). This rule applies only to the three twice born castes, viz., the Brahmana, Kshatriya and Vaishya, who alone are deemed to have gotras (family names) founded by ancient Rishi founders, and pravaras (primitive stocks) sages who contribute to the credit

1. ('08) 32 Bom 479: 10 Bom L R 184, Karsandas Dharamsey v. Gangabai.

2. ('14) 1 AIR 1914 P C 1: 25 I C 290: 42 Cal 384: 41 I A 290: 10 N L R 112 (PC), Ramchandra v. Vinayak.

3. ('73) 10 Bom H C R 444, Moro Vishivanath v. Ganesh Vithal.

of a particular gotra or family. No doubt at the present day Brahmans alone bear gotras and pravaras but the other two classes are held to bear the gotra and pravara of the family priests of their original ancestors both under the Mitakshara and the Daya-bhaga. In fact all the agnatic relations will be comprised in this rule, for whatever the gotra of a Kshatriya or Vaishya be his agnates howsoever remote, as far as the memory could go, will bear the same gotra and pravara. Therefore the rule governs agnates whether of Brahman caste or the other two regenerate castes. Marriage among agnates is, therefore, prohibited without any limit of degrees.

According to M'Cleven, the origin of the rule prevailing among Indo-Europeans in ancient times before their dispersion was the right of capture in marriage for men of one tribe in primitive times married a girl from another tribe, race or family, by capture, so that there was no marriage within that tribe, race, or family (Mayne, Edn. 8, p. 95). Other savants, however, do not subscribe to this view. Whatever the origin, the Hindus, however, for reasons shown above continue the usage of marrying outside the gotra (family) or pravara (primitive stock) and this rule of exogamy is almost strictly observed by Brahmans and the other two castes in practice. Substitute for the archaic gotra or pravara, the common clan or family name or surname which we style as nukh and exclude all agnates of that name from the matrimonial kinship. This seems to be observed from centuries. Consequently any union contravening this rule is absolutely null and void and the state of wife-hood in terms of the Mitakshara does not arise in the case of a girl, party to that union, and such a pseudo-wife is to be abandoned as a wife and supported as a mother (Bandhayana in Col. Dig. Bk. V, p. 340, Sumantu quoted in Bhattacharya, 1st Edn., p. 75 & Mit. 1, p. 53, Steele 166; Banerji, 1st. Edn. p. 59). The passage from the Mitakshara bearing on the point appears in Achara Kanda, Chap. 1.53 in course of comments on Yajnavalkya's Verse 53, which is quoted below for reference :

अरोगिणीं भ्रातृमतिम् असमानार्थगोत्रजाम् ।

पंचमात् सप्तमात् ऊर्चं मातृतः पितृतस्तथा ॥

One free from disease having a brother and not having a common gotra or pravara (with the bride-groom) and beyond the fifth and seventh degree from the mother and father respectively, (may be espoused). (Taj. 1.53).

The restriction as to sapinda (sapinda-

ship), appears in the preceding verse in the expression असपिण्डा (not being a sapinda), along with some other restrictions or qualifications such as being, younger, shorter, undefiled and agreeable which are only commendatory as is that mentioned as being free from disease and having a brother, while what is mandatory is non-sapinda, non-samangotraja and non-samanpravara. After fully commenting on the word a samanarsha-gotrajam, Mitakshara emphatically says in the following passage that the condition of wife-hood does not arise in the case of sapindas and samangotrajās, while in the case of girls who do not possess the other qualifications such as freedom from disease or having a brother, etc., it is not so, thereby clearly implying that the other restrictions are mandatory and cannot be transgressed. The passage in question may be cited in original :

सपिण्डासु समानगोत्रासु समानप्रवरासु भार्यात्वमेव नोत्पद्यते रोगिण्यादिषु तु भार्यात्वे उत्पन्नेऽपि दृष्टविरोध एव ।

In the case of sapindas, samangotra or samanparvara girls, wife-hood does not arise while in the case of those diseased, etc., though wife-hood does arise, the disqualification is only wordly.

Among the modern text-writers, Bhattacharya, Gurudas Banerji, Mayne, Trevelyan, Mulla who follow them, G. C. Sarkar and Ghose consider such marriages as absolutely void. The texts on which this conclusion rests are those of Bandhayana Sumantu and Narada which are cited below :

सगोत्राश्चेदमत्या उपयच्छेत् मातृवदेनां विमृश्यात् ।

"He who marries a girl of the same gotra inadvertently, must support her as a mother." (Bhattacharya 1st Edn., p. 75 Col. Digest Bk. V, 340). Sumantu says :

He who marries a daughter of his father's sister or of his mother's sister or a girl sprung from the same gotra with his maternal grandfather of one sprung from a gotra pravara must perform the chandrayana (penance as atonement) for the sin but abandoning her as a wife support her" (see Bhattacharya, 1st Edn., p. 75.)

Narada says as regards sapindas:

Those among whom marriage takes place within the seventh and fifth degree from the father and mother respectively, along with their offspring become degraded and attain the position of sudras." Text cited in the Mitakshara (see Sarkar Edn. 6 p. 112).

The above view is recognized in 32 Bom 619⁴ at page 627 where Chaubal J. definitely considers a sagotra or sapravara marriage as absolutely void and is of opinion

4. ('08) 32 Bom 619: 10 Bom L R 948, Ramchandra v. Gopal.

that the prohibitions are living law and usage of the Hindus of all the three regenerate castes. Recently it has been decided by the Lahore High Court in A I R 1933 Lah 585⁵ that marriage between sagotras is not void among the Kshatriyas or Vaishyas who have no gotras of their own. But in the face of the above authorities and clear expression of Mitakshara to the contrary as regards Kshatriyas and Vaishyas and the ruling of the Bombay High Court this decision is of doubtful authority, though, it will be welcomed by those like some of our community of Hyderabad Sind among whom a few lapses have occurred in recent times.

That the sagotra prohibition is not necessarily confined to those who can definitely profess to possess archaic gotras in their own right would appear from the following texts of Brihat Manu which show that samanodakas or persons connected by common oblations and who necessarily are agnates beyond the seventh degree and as far as their common name and descents be not known, are excluded from nuptials :

असम्बन्धाभवेद् या तु पिण्डेनैवोदकेन वा ।

सा विवाह्या द्विजातीनां त्रिगोत्रान्तरिता च या ॥

बृहद्मनु.

Cited by Raghunandana (see Sarkar's H. L. Edn. 6, p. 113.)

Among twice born castes, she should be espoused who is not connected by pinda common oblations of food or by 'udak' common oblation of water or who is removed by three gotras.

सपिण्डता तु पुरुषे सप्तमे विनिवर्तते । समानोदकमावस्तु निवर्तत आचतुर्दशात् । जन्मनम्नोः स्मृतिरेके तत्परं गोत्रमुच्यते ।

But the sapinda relationship ceases in the seventh degree; the samanodaka relationship however ceases after the 14th; according to some it exists if the descent and name are renumbered; the word gotra is declared to comprise these, [i. e. sapindas and samanodak as (cited in Mit. 2, 5, 6) Sarkar's H. L. Edn. 6, p. 66.]. Herein it is significant to note that the word gotra is used in the sense of family not archaic. This view is also reinforced by the doctrine that on marriage a woman is transferred from the gotra of her father to that of her husband (see Bhattacharya, Edn. 1, p. 76) which implies that the intending bride should in her maiden state have a gotra different from the one borne by her inten-

ded husband. The word gotra therefore does not necessarily mean the archaic gotra but like the word gotra the expression gotraja sapinda and bhinnagotraja sapinda means merely family.

It is not clear from the texts whether a girl whose marriage is thus void, can remarry. Chaubal J. thinks she cannot as divorce or dissolution is unknown to Hindu law. With due deference as the marriage is ab initio void and factum valet does not apply to it, the girl would be free to remarry unless she chooses to remain in which case she should be supported as a non-wife. No doubt deviations from the Hindu law may be here and there found to have been committed unconsciously or even consciously, but until such instances grow into an immemorial custom generally accepted in any community, the onus whereof lies on the party setting up such a custom, the ordinary law applies in full force: 32 Bom 619⁴ at p. 627. Now, in our community of Amils three deviations from this gotra rule, two of which are only within about three years old, have occurred in a family where the bride's party is the same and are due to the ignorance of the common nukh or family name as the *braderies* of the bride and bridegroom bear different names, though their nukh is common. These are Man-sukhanis, Shivdasanis and Thadhanis (of Nihiyayun Jo Pir). Two other instances of intermarriage in the same nukh occur among the Gidvanis and Jagtjanis of the same Manchundia nukh. One instance is noticed among Sitlanis and Advanis also belonging to the same nukh or stock called Mag. Two instances have occurred where the *braderie* is the same, also in recent times among the Advanis, where too the bride's family is the same. These instances occurred from a misconception of the law, as the parties professed to act on the assumption that they were beyond seven degrees and that the rule of sapinda of seven degrees' limitation alone applied to them. The Mukhi who was an Advani was made to acquiesce by such an opinion expressed by the parties, the bridegroom or the bride's father who were lawyers. Quite recently three more instances have occurred among people of the same *braderie* living at Karachi also presumably under the same misconception. The sixth instance has occurred among the Shivdasanis now living at Karachi beyond the sapinda limit on the same ground, the parties or one of the parties in these cases also being lawyers. Two

5. (1933) 20 AIR 1933 Lah 585 : 142 I C 211 : 34 P L R 207, Sri Krishen v. Sham Sunder.

other instances also very recent come from the Makhjanis and Malkanis respectively which also falls under the same category. There may be other instances of the breach of the rule but not to our knowledge. The paucity of instances clearly shows that the Hindus of Sind have generally observed the Hindu law of marriage faithfully according to the letter and spirit of the Mitakshara system which as modified by Mayukha, but not so as to override it, prevails in Sind.

RULE II. Sapinda rule. — The question of prohibited degrees really comes in under this rule. The sages are not uniform about the prohibited degrees evidently because there has been a development in the law from time to time. From the two Vedic texts on the subject it would seem that at first in common with the Indo-Aryans, only the sagotra girls were prohibited, for parties in the second degree being brother and sister would be interdicted under the gotra rule. Therefore when the texts prohibit 2 and 2 or 2 and 3 degrees on the mother's and father's side respectively it means that in the third or fourth degree, only unions with cognate girl would be permissible. As in the first text from the Rigveda, the very first cognate relations such as father's sister's daughter, and mother's brother's daughter are referred to as legible brides, it seems that cognates at first were not prohibited at all except where the union be with a sister's daughter which was repugnant to both Aryans and Semitics, as she was considered a daughter. In course of time sapindaship was extended to cognates, and Manu and Apastamba prohibited marriages of cognate girls up to the seventh degree whether he was related on the father's or mother's side. Sumantu was of the same view, though he also referred to the view of some others as 5 and 5. Vasishta who still adhered to an earlier stage of the law prohibited 6 and 4 degrees while Paithanise wavered between 7 and 5 and 5 and 3 and expressed alternative views. The majority however clung to 7 and 5 and they were Gautama, Sankha, Vishnu, Yajnavalkya and Narada, whose views were accepted by Vijñaneshvara in the Mitakshara and were the law of India for centuries. Even Dayabhaga and the followers of that school made few changes in the law of marriage and were not so liberal as they were in the law of inheritance.

Vijñaneshvara promulgated the sapinda doctrine based on the community of the particles of the same body. All those per-

sons who were connected with each other by blood relationship or in the words of Mitakshara of identity of body within 7 and 5 degrees on the side of the father and mother respectively were sapindas and their girls within those degrees were prohibited. Sapindaship under the Mitakshara is therefore determined by counting 6 or 4 degrees upwards from the bride or bridegroom, excluding them, according as it is through the father or the mother respectively and if the common ancestor is not reached within those degrees then only they are non-sapindas and therefore eligible for marriage (Mandalik's H. L. 347; Bhattacharya, Edn. 2, p. 90; 42 Cal 384²). This is the simple Mitakshara law on the subject, and if the upward lines pass both through males and females as they would do under the definition of sapinda given by Mitakshara, it would seem that 2121 persons would be ineligible for marriage either as bridegrooms or brides, that is to say, there would be altogether 4242 sapindas for marriage (Mandlik, 347; Mayne, Edn. 8, p. 104). It will be seen that under the Mitakshara not only the maternal ancestors of the bridegroom within five degrees are to be considered, but the maternal ancestors of the bridegroom's father or his paternal ancestors within the same limit are to be considered, although literally on the paternal side seven degrees limit will apply even when the maternal ancestors of paternal ancestors are considered, but it does not stand to reason that while in the case of the bridegroom himself only five degrees on the maternal side are counted, in the case of his father or other paternal ancestors the maternal lines should be carried to seven degrees. It is here that the Bengal school differs from the Mitakshara.

According to Raghunandana, the maternal lines of paternal ancestors above the father are not recognized at all as sapindas and are therefore eligible for marriage. To this extent the sapinda relationship is curtailed in Bengal but on the other hand the relations are increased by enlarging upon the well-known text of Manu on sapindaship and the special interpretation put on the text of Narada to be referred to below and read with the text of Satetapa on technical bandhus by Raghunandana, the chief exponent of the Bengal school, who owing to his learning and eminence got Dayabhaga accepted as the leading authority in Bengal in supersession of the Mitakshara. Raghunandana rejects the definition of sapinda-

ship given by Mitakshara. Sapindaship is one thing for inheritance another for mourning and still another for marriage. Sapindas for marriage are determined by certain rules deduced from the following texts :

Manu :

असपिण्डाच्च या मातुरसगोत्राच्च या पितुः ।

सा प्रशस्ता द्विजातीनां दारकर्मणि मैथुने ॥

Raghunandana interprets thus :

For the nuptial and holy union of a twice-born man she is eligible

1. Who is not the daughter of one who is of the same gotra with the bridegroom's father or maternal grandfather.

2. Who is not a sapinda of the bridegroom's father or maternal grandfather. (See Bhattacharya 1st Edn., page 70.)

Narada :

आसप्तमात् पंचमाच्च बन्धुभ्यः पितृमातृतः ।

अविवाह्या सगोत्राच्च समानप्रवरातथा ॥

— नारद १२.७.

(Vide Sarkar 6th Edn., page 112.)

Raghunandana's interpretation:

Girls descended from the father's and mother's bandhus are not to be taken in marriage as far as the seventh and fifth respectively as well as those of the same gotra and pravara. (Banerji's Hindu Law, 1st Edn., page 63.)

The word Bandhu in the above text is interpreted to be technical bandhu, in accordance with the following text of Satatapa cited in the Mitakshara and also Udvahatava of Raghunandana. It runs thus :

The sons of his father's paternal aunt and the sons of his father's maternal aunt and the sons of his father's maternal uncle be considered his father's bandhus. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt and the sons of his mother's maternal uncle must be deemed his mother's bandhus. (Banerji's 1st Edition, page 63.)

Before commenting on the interpretation of these texts it may be noted for the present that the father and the maternal grandfather in the text of Manu and the father's and mother's bandhus in the text of Narada are made the starting point for the calculation of degrees, so that the furthest common ancestor on the father's side is eighth from the intended bridegroom and seventh from the father and also the pitribandhus, and that on the mother's side seventh from the bridegroom and fifth from the maternal grandfather and the mother's bandhus. In the Mitakshara he is seventh and fifth respectively from the bridegroom who only is the starting point in the calculation. The following rules are deduced under the Bengal school by Raghunandana in his Udvahatava, Dayabhaga itself being silent.

(1) Female descendants in the paternal lines upto the seventh degree from the father and his six ancestors are excluded.

N. B.—This does not affect the gotra rule as regards twice-born castes, which interdicts girls of the same gotra (family) without limit of degrees.

(2) Female descendants in the maternal lines upto the fifth degree from the maternal grand-father and his four paternal ancestors are excluded.

(3) Girls related upto the seventh degree from the three technical pitribandhus (father's bandhus) and six ancestors beginning with their mother and her five male ancestors.

(4) Girls related upto the fifth degree from the three matribandhus (mother's bandhus) and then and their four ancestors beginning with their mother and her three male ancestors.

I. *Exceptions.*—Girls removed by three gotras from the bridegroom, though related within the seven or five degrees as above described are eligible, e. g., a great-great-grand-daughter in unbroken female descent in the paternal or maternal lines may be taken in marriage. This exception rests on a text of Brihat Manu and of Matsya Purana, which says "सन्निकर्षेऽपि कर्तव्यं त्रिगोत्रात् परतस्तथा." Even in nearness union may arise if distant by three gotras.

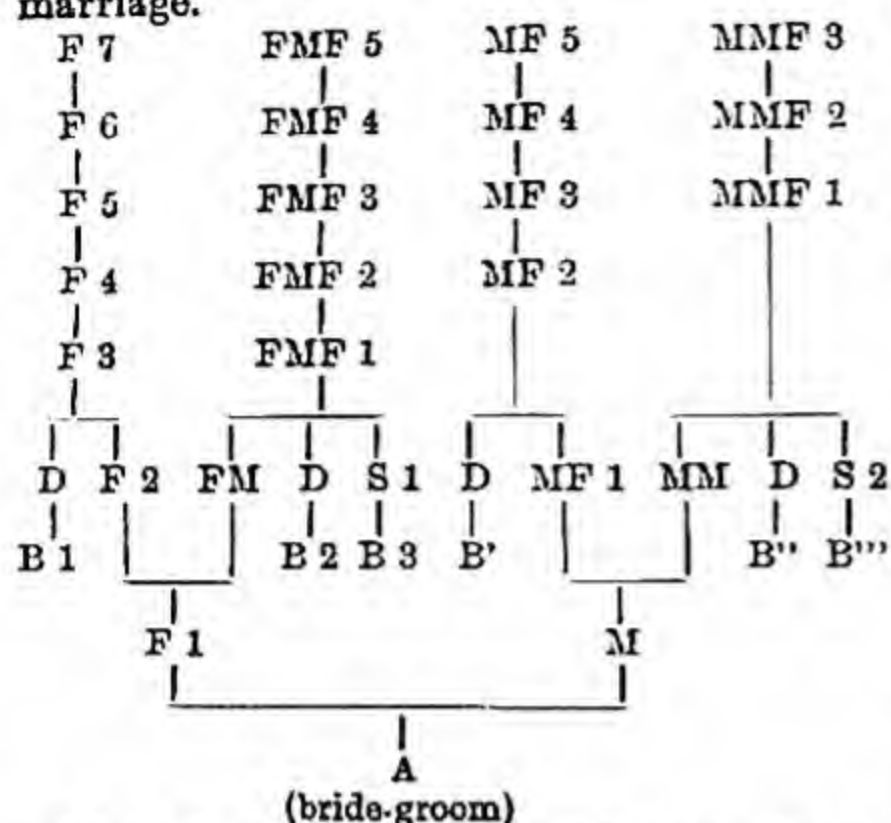
II. Among Kshatriyas in all forms of marriage and other inferior castes in the Asura form, when there is no fit match available within the prohibited degrees, marriages may be contracted contrary to the rule, provided the limit of five and three degrees on the father's and mother's side respectively is not exceeded. This exception rests on the authority of Shulapani, a Bengal Pandit of renown based upon Paithanisi's alternative text which runs thus :

असमानार्पेयीं कन्यां वरयेत् । पंच मातृतः परिहरेत्
सप्त पितृतः । त्रीन् मातृतः परिहरेत् पितृतो वा ।

One should marry a girl who is not of the same gotra, he should avoid those related within five or seven degrees on the mother's and father's side respectively or avoid such as are related within three or five degrees.

Raghunandana rejects this exception and considers marriages contracted within this exception as absolutely void but the rule having found its way in the usage of the Bengal people, it is considered as a valid exception (Banerji Edn. 1, p. 67 ; Bhattacharya Edn. 1, p. 74 ; Trevelyan Edn. 2, p. 42) and is now practised by all classes including

some Brahmins like the Kulin even irrespective of the form of the marriage. The following diagram will illustrate the lines of sapinda relationship excluded from inter-marriage.



N. B. F = Father, M = Mother, FM = Father's mother, F2 to F7 Paternal ancestors beyond the father, FMF = Father's mother's father, MF = Mother's father, MMF = Mother's mother's father, D = Daughter, S = Son, B1, B2 & B3 are the Pitribandhus, and B' B'' B''' are the Matribandhus.

It will be seen from the above rules that although Raghunanadan does not, in so many words, accept the definition of sapinda given in the Mitakshara as a person connected with particles of the same body, but inasmuch as the sapindas in the above four lines are all blood relations, at least for the purpose of marriage there would seem to be practically no difference between the two schools. Such difference arises only in respect of the number of degrees or of the lines excluded from marriage due to the peculiar interpretation put by the Bengal commentator on the texts referred to above. The first two rules are the main rules and are in conformity with the Mitakshara except that on the father's side the computation is carried up to the eighth degree from the propositus and on the mother's side to the sixth degree from the propositus while under the strict text of Mitakshara it is seven and five respectively. This is so because the computation proceeds from the father in the one case and maternal grandfather in the other as the starting point instead of the propositus based on his interpretation of Manu's text. The other two rules however are the main point of difference between the two schools. It is not at

all easy to understand as to why pitribandhus like father's paternal aunt's son who is B in the above diagram, and matribandhus like B in it, who is mother's paternal aunt's son are made the starting points of computation or from one line of exclusion each, where it is the question of A, the propositus to be considered in the matter of eligible girls. This rests on the crude interpretation of Narada's text which will be presently considered. But the real object is to reject the remote relations as sapindas, in the maternal lines of remote paternal ancestors beyond the father and those of the remote maternal ancestors beyond the mother such as maternal lines of maternal grandfathers and mother's maternal grandfather which are admitted by the Mitakshara and thus to enlarge the circle from where the girls may be married. By making the technical Bandhus as starting points and admitting them as a separate line one absurd result arises, viz., that the seventh descendant of the pitribandhu is the ninth descendant of the nearest common ancestor while the fifth descendant of the matribandhu is the seventh descendant of the nearest common ancestor, while ordinarily as the bandhu is a third descendant of the line of the common ancestor, only four and two further descendants from him will be excluded according as he is a pitri or matribandhu.

Now coming to the text of Manu quoted above, on which the structure of computation of degrees is based, if we look to the literal sense of the words matuh, मातुः (of the mother) and Pituh पितुः (of the father), we find that the text means that she who is the sapinda or sagotra of the mother, i. e., on the mother's side, or a sagotra or sapinda of the father, i. e., on the father's side is to be avoided in marriage. But, Raghunandana considers the expression, matuh to mean 'of the maternal grandfather' and Pituh 'of the father's as the starting points of computation. But if we take the same idea to be of Manu as is expressed in texts of other Rishis of similar import, it means sapindas or sagotras on the father's and mother's side respectively. Of course, a sapinda or a sagotra of the mother would really be the sapinda or sagotra of her father, as she assumes the gotra of her husband on her marriage, but as she is considered as one degree in computation, the literal sense ought not to be lost sight of, and start the computation not from the propositus but from the maternal grand-

father with the result that the upward lines are increased. This however is against the express text of the Mitakshara and the illustration it has given of the computation of degrees.

As regards the text of Narada, it is difficult to see why the word Bandhu should be interpreted as a technical Bandhu and why pitritah and matritah which mean 'on the father's side' and 'on the mother's side' should be translated by Raghunandana in the possessive sense as meaning 'of the father' and 'of the mother,' and bandhus of the father and bandhus of the mother should be interpreted with the aid of a third text of Satatapa in which examples of some bandhu heirs are given and in which the order of succession among bandhus is laid down, except it be to fit in the interpretation with a pre-conceived object which we have already said was to curtail the circle of cognate sapindaship. The text itself is of the type of the texts which declare to what degree relationship of sapindas or blood-relations extends and what type of relation is excluded from marriage. Accordingly, the word bandhu, in the text merely means a blood relation, or a sapinda, used in other texts and as such the text would mean "a girl from among blood-

relations or sapindas should not be married up to the seventh degree on the father's side, and up to five degrees on the mother's side, nor one of the same gotra or pravara."

That the word bandhu is used in some other texts of similar import to mean a sapinda or blood relation may be established from relevant portions of two texts of Gautama and Vasishtha cited below from Ghose H. L. Edn. 2, pp. 716 and 724. The commentator of Vasishth, Krishna Pandita expressly states that the word bandhu means an agnate :

असमानप्रवरैर्विवाह ऊर्ध्वं सप्तमात् पितृवन्धुभ्यो वोजिनश्च मातृवन्धुभ्यः पंचमात् ।

Gautama : Ch. 4. S. 1. 5.

A marriage is possible between persons who have not the same pravara from among bandhus (sapindas or relations) on the father's side beyond seven degrees or on the begetter's side beyond seven degrees or bandhus (sapindas or relations) on the mother's side beyond fifth degree.

गृहस्थो . . . असमानार्षेयाम् . . . भार्या विन्देत ।

पंचमी मातृवन्धुभ्यः सप्तमी पितृवन्धुभ्यः ।

Vasishtha : Ch. 8. S. 1.3.

One wishing to be a house-holder shall take a wife who may be fifth among bandhus (sapindas or relations) on the mother's side, and seventh among those on the father's side.

(To be continued.)

REVIEWS

Debt Relief in the Madras Presidency, by S. SUBRAHMANYA SASTRI, B.A., B.L., AND V. SURYANARAYANA B.A., B.L. The book can be had from V. Suryanarayana, B.A., B.L., Chicacole, Vizagapatam District. Pages 280, Price Rs. 2-8-0.

In this book the authors have given an exhaustive and critical commentary on the Madras Agriculturists' Relief Act and the allied Acts like the Debt Conciliation Act, the Usurious Loans Act and the Madras Debtors' Protection Act. They have discussed the principles underlying the sections with reference to case law which has been brought up to 1941 May. The authors have given their opinion on points which are either not covered by authority or on which there is conflict of decisions. The rules framed by the Government and the several forms relating to each Act has been

usefully included in the appendix. We are sure that this book will be found to be of great use to the Bench and the Bar. The printing and get-up leave nothing to be desired, and the price is moderate.

The Indian Conveyancer (2nd Edn.) by P. C. MOGHA, B.A., LL.B., published by Eastern Law House, Ltd., P-13, Ganesh Chunder Avenue, Calcutta. Pages 676. Price Rs. 10.

The fact that the necessity for a new edition of the book has been felt so soon after the first edition in 1938 only shows its popularity. In the edition under review, the notes have been carefully revised and brought up-to-date. The precedents have also been revised and a few new precedents added. We are sure that this edition also will be found very useful by lawyers and businessmen. The printing is good and price is moderate.

HINDU LAW ON PROHIBITED DEGREES IN MARRIAGE

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(Continued from page 88)

It will be seen that in the above two texts the word bandhu standing in a context to show which girls are eligible among father's and mother's relations, for marriage, can mean no other than a sapinda, for according to Vasishtha it is the sixth and fifth respectively on the father's and mother's side who is eligible that is to say one degree lower than other sages. It cannot mean technical bandhus of the father or the mother. A text from Narada Smriti itself from the same chapter in another connection shows that the word bandhu means a relation in general. The text runs thus :

अज्ञातदोषेणोढा या निर्दोषा नान्यमाश्रिता ।

वन्धुभिः सामियोक्तव्या निर्बन्धुः स्वयमाश्रयेत् ॥

(Ghose : Edn. 2, p. 719.)

A blameless girl married to a man whose fault was unknown, who does not consort with another, may be joined to a bandhu (a relation). One without a relation may choose for herself.

(Narada 12 Ch. 25.)

The conclusion therefore is irresistible that Raghunandana or his followers have in interpreting bandhus to mean technical bandhus merely twisted the text of Narada, in question to suit their own pre-conceived object without regard to the legitimate purport of the context. The interpretation of Mitakshara on the subject of prohibited degrees is therefore quite correct. It is true that Kamalakara who belongs to the Benares school, has adopted the rules deduced by Raghunandana, in his Nirnaya Sindhu, a subordinate authority in Benares and Bombay schools, but as the text of Mitakshara on marriage is clear and definite, Nirnaya Sindhu's authority cannot prevail over it and the law of marriage in Mitakshara provinces is governed by the Mitakshara itself as the paramount authority except where it is silent in which case Nirnaya Sindhu or a like treatise of the same school may be resorted to. It may be further noted that Mitakshara while discussing the subject of degrees and laying down the limit of sapindaship expressly refers to the above text of Vasishtha which gives a lower limit and explains it away, to avoid conflict but does not say that the word bandhu used in the text, means anything else than a sapinda.

Owing to the peculiar interpretation put upon the text of Narada in question, the

upward lines in the diagram given above are made to pass through males only, though it is admitted that in the downward lines i. e., among the descendants, the lines may pass through males and females indiscriminately. No reason is given for this distinction. The result however is that as already stated maternal lines of remoter paternal ancestors than the father and those of maternal grandfathers and mother's maternal grand-fathers have been excluded from sapindaship. We have dwelt on this subject of difference made between the upward and downward lines in another place (*vide* Article on Heritable Bandhus in AIR 1939 Jour p. 24), and it is therefore unnecessary to repeat here the reasons shown for the untenability of the distinction. The foundation as depending on the text of Narada having been shown to be wrong the conclusions arrived at are necessarily erroneous. Suffice it to say, that under the Mitakshara, lines may pass through males or females, whether in the upward or the downward group.

It must however be admitted that maternal lines of remoter paternal or maternal ancestors being too distant for ordinary intercourse between relations, and the necessary contact for exclusion wanting, marriages among those lines, within the prohibited degrees may be unconsciously taking place in practice even in the Mitakshara provinces for some such reasons that Bhattacharya remarks :

I must note also the fact that those who are governed by the Mitakshara school, practically exclude for purposes of marriage only the four lines that are considered ineligible by the Bengal school. (*Vide* Bhatta, H. L., Edn. 2, p. 91.)

But these deviations would be due to ignorance of relationship and not to any conscious violations of the Mitakshara rules, and cannot therefore detract from the validity thereof as the subsisting law of the Mitakshara provinces. Nor would it follow that in matters of marriage we are governed in those provinces by the Bengal rules. In fact except perhaps in the case of these distant maternal lines of remote ancestors not avoided in practice due to ignorance of relationship or cessation of contact, the Mitakshara rules are strictly followed not only as regards the computation of degrees as far as the seventh and fifth degree only

but in every other respect in which the two schools may differ. Consequently the second exception based on Shulopani's opinion of observing only 3 or 5 degrees on the mother's and father's side respectively, in Bengal is not observed in Mitakshara provinces in practice. The first exception of three gotra intervening to justify a marriage within the usual limit of 5 and 7 degrees, based as it is on the text of Brihat Manu and Matsya Purana and not on any peculiarity of the Bengal school, applies to Mitakshara schools of Benares and Bombay at least, where Nirnaya Sindhu is respected, though in the Madras school it is doubtful; the line of mother's mother's maternal grand-fathers where such gotras intervene is not excluded from sapindaship for inheritance (vide 49 Mad 652⁶) and therefore also for marriage for the two are co-extensive: 42 Cal 384.²

Stray instances of departure from the rules regarding prohibited degrees of sapindaship for marriage may be met with everywhere owing to different causes. In our own province among the Hyderabad Amil community a marriage with a maternal aunt's daughter occurred some years ago clandestinely between a graduate widower and a widow between whom intimacy had grown up. Recently another instance of marriage with a maternal aunt's daughter arose in a family where the girl being an orphan was looked after by her mother's sister. The bride and the bridegroom developed conjugal affections and determined after the death of the old lady to enter into matrimony and performed it clandestinely at Bombay without the consent of the boy's father. An instance of marriage with a paternal aunt's grand-daughter (i. e., son's daughter) brought about under similar circumstances has also occurred within the last three years. Another instance of a union between the children of female first cousins, which was also obnoxious to the gotra rule, arose at Karachi, and was also a love marriage. A fifth instance also, the result of a love affair between a highly educated man and a woman the latter being the daughter of the former's mother's paternal uncle, arose at Karachi a few days ago in spite of the Panchayat's interdiction, and consent of the parents who were unwilling was wrung out. A sadder instance of a so-called love

marriage arose between agnate's second cousins soon after, though interdicted.

In all these cases the couple have been reckless of the consequences such as the badge of bastardy attaching to the children of the marriage and disputes over succession to the property of their parents. For, it must be said that marriages of this nature are invalid under the Hindu law, as a marriage within prohibited degrees of sapindaship is like a sagotra marriage absolutely void (Bhattacharya, Edn. 2, p. 97; Banerji Edn. 5, pp. 70-71, Mulla Edn. 5: 429 Kulluka on Manu, Chap. 3, Paras. 5 and 11; Mit: 1.53, Trevelyan, Edn. 2, 40) and the doctrine of *factum valet* is inapplicable to it: 53 ALL 815;⁷ 56 Bom 71.⁸ It is a pity that some of our educated young men and women should forget their responsibility as citizens and members of their community or society so invade the inner family circle hitherto held so sacred and convert it into a centre of their amours, thus disturbing the peace of family and society, and lightly break their personal laws by which they are governed. The pernicious example set by these unions unless checked and counteracted by the panchayats and braderies (relatives of the same brotherhood) is bound to spread like a poison and eat into the vitals of our society. We would appeal to our young people to cry halt, preserve the sacred family circle and save the society from commotion and not bring modern education unnecessarily in disrepute.

Affinity.—Relationship by fosterage is not recognized in Hindu law but certain rules founded on affinity are laid down. (1) A stepmother's brother's daughter or daughter's daughter is prohibited in marriage. This is based on the text of Sumantu (Bhattacharya 2nd Edn.; 95). According to Western lawyers a stepmother's sister or sister's daughter is also prohibited, *ibid* p. 95, and some consider the word "mother" in the texts to include stepmother and prohibit all her sapinda relations (*ibid*, p. 95 and Trevelyan, Edn. 2, p. 43.) This rule is considered by Sirkar, to be only recommendatory (Sarkar, Edn. 3, p. 92). An instance of a marriage with a stepmother's sister occurred among the Amils in Hyderabad about 12 years ago in spite of panchayat's interdiction clandestinely.

6. ('26) 13 A I R 1926 Mad 881 : 95 I C 651 : 49 Mad 652: 51 M L J 16, Kesar Singh v. Secy. of State.

7. ('32) 19 A I R 1932 All 5: 133 I C 289: 53 All 815 : 1931 A L J 816, Ram Harakh v. Jagar Nath.

8. ('32) 19 A I R 1932 Bom 156; 137 I C 732: 56 Bom 71: 34 Bom L R 83, Salubai v. Keshav Rao.

(2) The paternal uncle's wife's sister and her daughter and wife's sister's daughter are excluded. This rule too is considered only directory (Bhattacharya, Edn. 2, p. 95, Banerji's Edn. 3, p. 67, Sarkar, Edn. 3, p. 92 Trevelyan, Edn. 2, p. 4). In 20 Mad 288⁹ and 43 Mad 830¹⁰ a marriage with a deceased wife's sister, niece or aunt was held valid.

(3) A marriage with a maternal or paternal uncle's wife, the mother-in-law and an elder brother's wife is void unless sanctioned by a special custom: (vide 8 ALL 143.¹¹)

This rests upon the text of Brahspati which says :

मातु स्वसा मातुलानी पितृव्यस्त्री पितृस्वसा ।

श्वश्रूः पूर्वजपत्नी च मातृतुल्याः प्रकीर्तिता ॥

(cited in Dayabh. Ch. 4, S. 3, para. 31.)

The mother's sister, maternal uncle's wife, paternal uncle's wife, father's sister, mother-in-law, an elder brother's wife are considered equal to a mother.

In Sind especially in the north, marriage with an elder brother's widow is common.

(4) *Widow*. — For remarriage a widow should be deemed to have the gotra of her father and is therefore prohibited to his sapindas (Bhattacharya, p. 96, contra 58 ALL 1053¹²) but admissible to her husband's sapindas except her issues.

(5) Adoption does not relieve the adopted boy from the restriction on marriage to which he was subject before the adoption in his natural family and also subjects him to the same in his adoptive family.

Local customs. — In the Bombay Presidency, on the side of Akola and Sholapur, a marriage with maternal uncle's daughter is invalid under a custom; in some places there have been cases where daughters of maternal and paternal aunts are allowed in marriage by custom (Gharpure, Edn. 3, p. 65). In the south of India marriages with a maternal uncle's daughter, paternal uncle's daughter are permitted by custom (Mayne, Edn. 8,

9. ('97) 20 Mad 283 : 7 M L J 184, Raghavendra Rau v. Jayaram Rau.

10. ('20) 7 A I R 1920 Mad 715 : 59 I C 268 : 43 Mad 830 : 39 M L J 183, Ramakrishna Rao v. Subbanna Rao.

11. ('86) 8 All 143 : 1886 A W N 43, Lachman Kuar v. Mardan Singh.

12. ('36) 23 A I R 1936 All 624 : 164 I C 595 : 58 All 1053 : 1936 A L J 970, Radha Nath Mukerji v. Shaktipado Mukerji.

p. 106) and even the some smirities and digests make reference to such a custom. A marriage with sister's daughter is also customary in some places in Madras (Bhattacharya, Edn. 1, p. 77), but the Bombay High Court considers such a marriage as incestuous (Mandlik, p. 438) and does not recognize the usage while the Madras High Court regards the marriage as invalid and not warranted by usage (20 Mad 283.⁹)

Need for change. — An eminent lawyer friend suggests that the time is come when the rigour of the law might be relaxed by means of legislation. But a change would not be applauded merely to accommodate a few truants among our young people or to screen their faults, and can only be justified if the general consciousness of the Hindu public is awakened in this respect and they desire it. Every nation or society has some limitation of degrees in their marriage laws. The Jews and the Mahomedans stop at the second degree. Some of the European nations who originally practised exogamy, adopted this Semitic custom after conversion to Christianity but the large majority of Christians who belong to the Roman Catholic faith still observe the five degrees limitation and some Slavonians still marry outside the family. The Indian civil law of marriage has prescribed the all round rule of four degrees as the prohibited limit. The Bengal Hindus, in spite of Ranghunandana's elaborate rules, adopt the Paithanishi's rule of three and five degrees limitation in practice in the case of cognate sapindas. If, therefore, a change is needed, we might by legislation adopt the Bengal practice or the civil rule of four degrees but confine it only to cognate sapindas. As regards the large class of sagotras or gotraja sapindas (agnates), we might adopt the seven degrees limitation which is slowly infiltrating into our society and which has been recognized by the Lahore High Court for Punjab Hindus; but to reduce it further will be adopting an alien culture. A provision authorizing a member of the Hindu community to apply for an injunction to prevent a marriage contemplated within the prohibited degree will be necessary in order to enforce the law, and any infringement of the law may also be made punishable as an offence to ensure its observance.

THE FULL BENCH CASE OF RADHABAI v. RAJARAM OF THE BOMBAY HIGH COURT

by N. B. Budhakar, B.A. (Hons.) LL.B., Karad.

The Full Bench case in 40 Bom L R 559¹ leads to results unknown to Hindu law and, it is submitted, that the decision in the case is not good law. The facts of the case are: one Keshava was the owner of the suit property. He died leaving a widow Bhagirthibai, a son named Dhondiram and the widow of a deceased son, who was defendant 1. Dhondiram died in 1899, leaving a widow, Laxmibai, and an infant son who died in 1900 and thereupon the property passed to the mother of the infant son, Laxmibai. Laxmibai died in 1901 and thereupon the property passed to the mother of Dhondiram, Bhagirthibai. She died in 1908 and the property then passed to defendant 1. Her claim was made through the last holder, i. e., the infant son of Dhondiram, and she took as the widow of the paternal uncle of the last male holder. She adopted defendant 2. Plaintiff Rajaram, as the next reversioner, sued for a declaration that the adoption of defendant 2 by defendant 1 was illegal and void and that defendant 2 had no title to the property by virtue of his adoption.

Two points arose for decision: first, the validity of adoption and second, the effect of such adoption on the devolution of property. As regards the first, their Lordships following the decision in 35 Bom L R 859² held the adoption valid and as regards the second they held that such adoption had not the effect of altering the course of devolution of property. In this suit the fight was between the reversioners and the adopted son. The adopting widow was a party to the suit and was ranged on the side of the adopted son. Moreover she died pending the litigation and hence the question whether the estate vested in the widow would be divested by her adoption did not arise in so many words. Hence in 41 Bom L R 208³ the case of *Radhabai v. Rajaram*¹ was interpreted to have decided that

the widow of a gotraja sapinda who succeeded to any property as such cannot by adoption alter after her own death the devolution of property to which she was entitled as such widow.

1. ('38) 25 AIR 1938 Bom 383 : 177 I C 165 : 1 L R (1938) Bom 679 : 40 Bom L R 559 (FB), *Radhabai v. Rajaram*.

2. ('33) 20 AIR 1933 P C 155 : 143 I C 441 : 12 Pat 642 : 60 I A 242 : 35 Bom L R 859 (PC). *Amarendra Mansingh v. Sanatan Singh*.

3. ('39) 26 AIR 1939 Bom 123 : 180 I C 966 : 41 Bom L R 208, *Shivappa v. Kariappa*.

In this case the suit was brought by the adopted son against the alienees from the widow of the last holder for possession of the property to which the adopting widow had succeeded as a widow of a gotraja sapinda. His Lordship Divatia J., distinguishing 40 Bom L R 559,¹ held that by virtue of his adoption the property had immediately vested in the plaintiff (adopted son) as absolute owner and was entitled to recover possession of the suit property.

The decision in this case, though consonant with the spirit of Hindu law, was contrary to the decision in 40 Bom L R 559.¹ By holding that the estate vested in the adopted son and that the adopted son became the absolute owner the decision did alter the devolution of property even after the death of the widow. The point whether such adoption divested the estate vested in the widow was decided impliedly in 40 Bom L R 559,¹ for by holding that such adoption had not the effect of altering the order of devolution of property and that it did not affect the rights of reversioners, the decision had answered the point in the negative. And it is on account of this that the distinction which his Lordship Divatia J. drew between the case with which he was dealing and the case in 40 Bom L R 559¹ fails to carry conviction. His Lordship says:

It may be stated here that in that case, 40 Bom L R 559,¹ the contest was between the adopted son and a reversioner and it was held that although the widow succeeded to the family property as the widow of a gotraja sapinda and had only a life estate in her she cannot by her adoption divest the family property which had devolved upon the reversioners though the adoption itself was good for religious purposes.

The conception of the widow's estate being a life estate and that of the reversioner being a vested interest is against the law established by long series of decisions. If it is to be considered that the interest of reversioners is a vested interest how can the adopted son divest the widow and become an absolute owner? In a very recent case, 43 Bom L R 492,⁴ the Bombay High Court has disapproved 41 Bom L R 208³ and has followed the decision in 40 Bom L R 559.¹ The facts of the case are as follows: Tukaram and Baji were two separated brothers. Tukaram died leaving him surviving his

4. ('41) 28 AIR 1941 Bom 323 : 43 Bom L R 492, *Subrao v. Dada*.

widow Jana, his brother Baji, and Baji's wife Ahilya. Jana inherited her husband's immovable property which she sold to the father of the defendant Dada Bhiva. Baji then died leaving him surviving his widow Ahilya. On Jana's death the property of Tukaram passed to Ahilya as the widow of a gotraja sapinda. Then Ahilya adopted the plaintiff Subrao, who sued to recover from the defendant the property which had been in his possession on the ground that the sale by Jana was not for legal necessity. It was contended in this case that the adoption did not divest the estate of Tukaram and that therefore the adopted son had no right to sue and this contention was upheld by their Lordships observing:

Under the Hindu law the widow of a gotraja sapinda cannot by adoption alter the order of inheritance of the property inherited by her as such and divest the reversioner, although such property consists of a right to sue for possession of immovable property.

The law therefore on this point at present stands thus: (1) An adoption by the widow of a gotraja sapinda does not divest the estate vested in her as such, and (2) such adoption has not the effect of altering the devolution of the property after the death of the widow. Both these propositions, it is submitted, are not good law. They are contrary to the spirit of the Hindu law. The first proposition is the logical result of the decision in 89 Bom L R 382.⁵ The decision in this case is however open to grave objection. It brings into existence an anomalous situation not contemplated by the Hindu law. It creates what may be called mutilated sonship. It confers the status of sonship on an adopted son and at the same time denies him the rights of property which must follow as a necessary consequence. We shall examine this case for a while. The facts of the case are: There were three brothers, members of a joint family, namely Babaji, Laxman and Vithal. Babaji died on 9th July 1909 leaving a son Govinda who died leaving a widow Tayaji and a daughter Bhima. Laxman who died on 5th July 1919 had two sons, Sakham and Shankar, both of whom predeceased him, and a daughter. Shankar died unmarried but Sakham left a widow Bayaji who in 1928 adopted Balu, defendant 1. Vithal died in 1903 leaving a son Shiva and a daughter Avadi. Shiva died on 10th July 1919, leaving a widow Gouri who remarried in 1925. When Shiva died he

was the last surviving coparcener and on his death his widow Gouri was the heir and on her remarriage the property passed to Avadi as the next heir. The suit was brought by the purchaser from Avadi for possession against the adopted son. The question that fell to be decided was whether the adoption by Bayaji, the widow of the predeceased coparcener of defendant 1 during the period in which Gouri was the heir of Shiva, had the effect of vesting the property in the adopted son and divesting it from the heirs of Shiva. Their Lordships held that:

Where the adoption takes place after the termination of the coparcenary by the death of the last surviving coparcener the adoption by the widow of a predeceased coparcener . . . does not divest property from the heir of the last surviving coparcener or those claiming through him or her.

In other words their Lordships held that property vested by inheritance cannot be divested. And this principle was applied to the facts in 40 Bom L R 559¹ and the result, as made clear by the decision in 43 Bom L R 492⁴ is that an adoption made by the widow of a gotraja sapinda has not the effect of divesting property vested in her as such. To hold an adoption valid and to refuse the adopted son the rights which his status ought to confer on him is unthinkable and it is the F. B. case in 39 Bom L R 382⁵ that ushers in this doctrine—doctrine of mutilated sonship. Previous to this case there is not a single case in which we can find any trace of such an anomalous state of affairs. On the contrary we find an attempt always made by all the High Courts in India to hold such adoptions only valid as shall have the effect of divesting property.

The decision in this case is, as I said above, open to objection. It is contrary both to authority and the spirit of the Hindu law. It makes distinction between an adoption made during the continuance of a coparcenary and an adoption made after the extinction thereof, so far as regards the divesting of property. This is quite contrary to the principle enunciated in and to what was decided in 35 Bom L R 859.² Such a distinction is really swept away by the decision in that case. In it the property had vested in the heir "strictly by inheritance" and the judgment proceeded on that basis. The Judges of the High Court of Bombay assumed otherwise and rested their decision on the case in 14 Bom 463⁶ (a case of adoption by the widow of a predeceased coparcener after the extinction of the coparcenary when the estate had vested in the heir of the

5. ('87) 24 A I R 1937 Bom 279 : 170 I O 898 : I L R (1937) Bom 508 : 89 Bom L R 382 (F B), Balu Sakham v. Lahoo Sambhaji.

6. ('90) 14 Bom 463, Ohandra v. Gojarabai.

last surviving coparcener) which must be deemed to have been overruled by the ruling in 35 Bom L R 859.² With respect to the decision in 39 Bom L R 382⁵ it is observed in Mayne's Hindu Law as follows :

The decision of the majority was that the adoption was valid but that it did not divest the estate which had vested by inheritance in the widow of the surviving coparcener. The learned Judges erroneously assumed that in 35 Bom L R 859² and in 37 Bom L R 562⁷ a coparcenary was in existence at the date of the adoption. The very opposite is clearly stated by Sir George Lowndes in 35 Bom L R 859² and is to be found in the decision of the High Court in 37 Bom L R 562.⁷ (Mayne, 10th edition, 237.)

Secondly the decision in 39 Bom L R 382⁵ leads to results not contemplated by the Hindu law. The following two illustrations will make this clear. (a) A Hindu joint family consists of a father and his son. The son dies leaving behind him his widow, father and mother. The father then dies leaving his widow and the widow of his son behind him. The estate will vest in the widow of the father as heir of the last surviving coparcener father. The widow of the son then adopts. This adoption, as per decision in *Balu v. Lahu*,⁵ will not have the effect of divesting the property vested in the widow of the father. It is quite contrary to the Hindu law that the grandmother should hold the family property in the presence of her grandson. (*Vide* A I R 1939 Bom 81,⁸ wherein the grandmother is a step-grandmother). (b) A father, his wife and a son by a predeceased wife constitute a joint family. The father dies first; then dies the son and the stepmother succeeds to the family property as a widow of a gotraja sapinda; she then adopts. The adoption is valid according to the decision in 35 Bom L R 859;² yet the estate vested in her will not be divested according to the decision in 40 Bom L R 559.¹ It is not contemplated by the Hindu law that the stepmother should hold the family property when there exists a son. In A I R 1938 Nag 423⁹ the Nagpur High Court has not followed the decision in 39 Bom L R 382⁵ though the facts there were similar to those in 39 Bom L R 382.⁵ The Judges of the High Court emphasize the peculiarity of the family property and the peculiar relation which the adopted son bears to the same. The Judges said :

7. ('35) 22 AIR 1935 P C 95 : 155 I C 493 : 59 Bom 360 : 62 I A 161 : 37 Bom L R 562 (P C), *Vijayasingji v. Shivsingji*.

8. ('39) 26 A I R 1939 Bom 81 : 180 I C 411 : 40 Bom L R 123, *Alandibai v. Vasudeo*.

9. ('38) 25 A I R 1938 Nag 423 : 179 I C 82 : I L R (1939) Nag 88, *Mt. Droupadi v. Vikram*.

The sole (surviving) coparcener holds a species of property which is intended for the support of those "who are born, who are yet unbegotten, who are still in the womb" and consequently on behalf of his natural born son, yet unbegotten, as well as any son who would be adopted by the widow of a deceased coparcener. Why are these after born sons or after adopted sons able to divest the estate which had already lapsed to the sole surviving coparcener by survivorship? Obviously because the property is ancestral and required for their support. It must not be overlooked that these sons derive their right not from their relationship to the surviving coparcener but to the propositus, the common ancestor, who acquired the estate or its nucleus.

They further said :

It is clear that a person in whom the property is vested after the death of the sole surviving coparcener of a joint family takes it subject to defeasance in the event of an adoption by the widow of a predeceased member of the quondam joint family. The defeasability of the vesting of such an estate is implicit in the very fiction that a widow is the surviving half of the husband. The husband becomes fully alive for juridical purposes in the form of the adopted son on the well-recognized Vedic Doctrine "the father is born as the son." Consequently, the adopted son must get such interest as his father would have got had he been alive at the date of the adoption. To conclude, it is the right of the adopted son and not the existence of the coparcenary that is the true criterion for determining the judicial effect of the adoption.

So far we have seen that the principle laid down in 39 Bom L R 382⁵ is not good law and that therefore its extension to 40 Bom L R 559¹ in holding that the adoption has not the effect of divesting property vested in the widow of a gotraja sapinda as such cannot be sustained. Hence it may be laid down as a general rule that an adoption by the widow of a gotraja sapinda should divest such property as the father of the adopted son would have held or inherited if he were alive on the date of adoption. It is arguable that the Hindu law does not recognize defeasible estates. His Lordship Beaumont C. J., observes in 39 Bom L R 382⁵ :

There is another well established rule of Hindu law that on the death of a separated householder or last surviving member of a coparcenary the inheritance passes at once to the nearest heir or group of heirs and cannot be held in suspense subject to a possible adoption. Hindu law does not recognise, as does English law, an estate vested but liable to be divested.

But an answer to this is furnished by the next following sentence.

In the case of an undivided family the inheritance does, no doubt, open to let in a coparcener subsequently born or adopted and the law regards the vesting in the existing coparcener as merely temporary to prevent the ownership as being in abeyance.

Moreover in the cases of adoption by a widow on the death of her husband and by a widow succeeding as mother to her son,

when her power of adoption is not exhausted or extinguished, the estate is divested and the principle of defeasible estate is recognized. If any authority from Sanskrit text is needed the following may be cited :

विभागोत्तर काल्मष्यौवधादिना दोषनिर्हारे भाग-
प्राप्तिस्त्वैव । (Mit. Ch. 2 S. 10 paras 6 and 7.)

A coparcener who is excluded from a share on partition by reason of a disability is entitled on removal of it to a share in the family property. Partition vests in the separated coparceners their respective shares as owners. If however a coparcener who is excluded on account of his disability is cured of the same he divests the separated coparceners of property to the extent of his own share. Hence it is doing injustice to Hindu law to say that it does not recognize defeasible estates.

An argument based on the rule of stare decisis is advanced to support the decision that such adoptions should not have the effect of divesting property. It is observed in 39 Bom L R 882⁶ that

these rules (regarding the divesting of property summarized in Mulla's Hindu Law Edn. 8, p. 553) have existed for many years and a great number of titles must depend upon them. In my opinion it would be quite wrong for any Court in this country to hold that the Privy Council intended to cast a doubt on long established rules which were not referred to and override cases not cited on which titles depend. So to hold would in my judgment be mischievous in the extreme and would open the gates to a flood of litigation.

Similarly in 40 Bom L R 559¹ his Lordship in answering the question whether the adoption would have the effect of divesting property said :

The answer to the question must depend mainly on considerations of expediency with particular regard to the danger of upsetting titles.

But this argument cannot be upheld in view of the Privy Council decisions in 35 Bom L R 859³ and 37 Bom L R 562.⁷

Their Lordships of the Nagpur High Court observe as follows :

It is not open to the Courts in India to question any principle enunciated by the Board which must therefore be followed irrespective of the inconvenient and embarrassing results which may attend the application of the principle : (A I R 1938 Nag 423.⁹)

The second proposition that the adoption by the widow of a gotraja sapinda has not the effect of altering the devolution of property vested in her even after her death leads to the result that the adopted son will not succeed to the property even after the death of the widow, though he will be nearer heir to the last holder if he happened

to survive the widow. This is adding insult to injury. Not only does he not get the property during the lifetime of the widow but he does not get it even after her death. This assumes that the right of reversioners is a vested right and therefore cannot be defeated. This is contrary to authority.

The estate of a widow is not a life estate nor is the interest of reversioners a vested interest. The interest of reversioners is a spes successionis and is liable to be defeated by the emergence of a nearer heir :

The interest of a reversioner is an interest expectant on the death of a limited heir. It is not a vested interest. It is a spes successionis or a mere chance of succession within the meaning of the T.P. Act, S. 6 (Mulla, Hindu Law, Edn. 7, p. 169.)

The reasoning followed in 40 Bom L R 559¹ is also unsound. Their Lordships base their decision upon three cases, i. e., 32 Bom 499,¹⁰ A I R 1922 Bom 321¹¹ and A I R 1922 Bom 347.¹² Their Lordships observe :

There is no doubt that the three cases do recognize that the widow of a gotraja sapinda cannot by adoption alter the devolution of property to which she is entitled as such widow after her own death.

It is submitted that the reasoning of those three cases is misunderstood. The question to be decided in each of the three cases was whether the adoption was valid. And the adoption was held invalid because if it were held invalid it would have the effect of divesting property. According to the view of the law then prevailing the test of a valid adoption was whether property was divested. The validity of an adoption depended upon considerations of vesting and divesting property. At present the considerations of divesting of property do not enter into the discussion of the validity of an adoption. Considerations of a religious character are alone the test of the validity of adoption provided the power of adoption is not at an end. In the three cases if the adoption had been held valid it would have the effect of divesting property. Why should not those effects follow when the adoptions are held valid ? They must follow as a necessary consequence.

Hence it is submitted with respect that the decision in 40 Bom L R 559¹ and also that in 39 Bom L R 382⁶ are not good law.

10. ('09) 32 Bom 499 : 10 Bom L R 692, Datto Govinda v. Pandurang.

11. ('22) 9 A I R 1922 Bom 321 : 77 I O 17 : 46 Bom 541 : 24 Bom L R 69, Dattatraya v. Gangabal.

12. ('22) 9 A I R 1922 Bom 347 : 77 I O 117 : 47 Bom 37 : 24 Bom L R 836, Ekanath v. Laxmibai.

An Introduction to the Law of Limitation and Prescription in British India (4th Edn.) by K. J. KHAMBATA, M. A. LL.B., F.S.S., ADVOCATE (O.S.), *High Court and Presidency Magistrate, Bombay*. The book can be had from N. M. Tripathi & Co., Booksellers & Publishers, Princess Street, Bombay. Pages 238. Price Rs. 4-4-0.

The fact that the author's book has run through four editions in the course of a decade shows its popularity and utility, particularly among students for whom it is mainly intended. The author has given in a concise form the principles of the law of limitation and prescription as applied in British India and Burma. In the edition under review, the general scheme of the previous edition has been maintained. Legislative amendments have been noted in their proper places and case law has been brought up to end of June 1941. Text of the Limitation Act as amended up-to-date is given for purposes of reference and all the amendments made by the Government of Burma (Adaptation of Laws) Order, 1937, and the Burma Laws (Adaptation) Act, 1940, have been given. Relevant sections of the Easements Act and Arbitration Act and some examination questions are also usefully included in the book. We have great pleasure in recommending this book to students and young practitioners. The printing and get-up leave nothing to be desired.

Shrivastava's Law Dictionary (English-Hindi) by PARMESHWAR DAYAL SHRIVASTAVA, *Vakil, High Court, Jayaji Chawk, Lashkar, Kotwali Street, Morar, Gwalior* AND SHIV DAYAL SHRIVASTAVA, B.Sc., LL.B., *Vakil, High Court, Gwalior*. Pages 250. Price Rs. 5.

The authors have given in this book all the English legal words and phrases and

their meanings in Urdu (Nagri character) and Hindi together with explanations and references to important enactments in force in British India. The book will be useful to the Bench and Bar in places where the proceedings are carried on in Hindi or Urdu; and in other places, it will serve as a reference book.

New Company Rules and Forms (1st Edn.) by LAKSHMI NARAIN MEHRA, B.A., LL.B., PLEADER, *Chandni Chowk, Delhi*. Published by S. Abdul Rahim, Next to Central Bank, Chandni Chowk, Delhi. Pages 64. Price As. 8.

This booklet contains all the forms with useful hints for their use. The Indian Companies Rules, 1941, as amended up-to-date, have also been usefully given.

Law and Practice of Conveyancing by SIR JAI LAL, formerly a Judge of Lahore High Court. Published by University Book Agency, Law Booksellers and Publishers, Kacheri Road, Post Box No. 257, Lahore. Pages over 350. Price Rs. 10.

The book is divided into four parts. The first part contains a discussion of certain principles and provisions of law which a lawyer should know in order to be able to investigate the title to property and prepare drafts of documents. The second part deals with the law relating to wills so far as it concerns the preparation of testamentary documents. The third part contains useful hints to lawyers while preparing drafts and the fourth part gives forms and precedents. Thus the book is as comprehensive as possible with due regard to its objects. As there are few Indian books on this important subject, this book is bound to be of great use to lawyers. The printing and get up are good.

A NOTE ON RAM SHAH v. LALCHAND

(Reported in A. I. R. 1940 P. C. 63)

by C. V. L. VARA PRASAD RAO, Advocate, Vizagapatam.

The decision of the Privy Council reported in A I R 1940 P C 63¹ appears to have given rise to conflicting conclusions, regarding the validity and binding nature of indorsements of payments on the back of documents in order to save limitation and that therefore an article explaining the scope of the said decision is not out of place. The said decision of the Board deals with s. 20, Limitation Act, as amended by Act 1 of 1927. The amended section as it stands now runs as follows :

Where interest on a debt or a legacy is, before the expiration of the prescribed period, paid as such by the person liable to pay the debt or legacy, or by his agent duly authorized in this behalf,

or where part of the principal of a debt is, before the expiration of the prescribed period, paid by the debtor or by his agent duly authorized in this behalf,

a fresh period of limitation shall be computed from the time when the payment was made.

As remarked by the Full Bench in A I R 1935 ALL 946,² it is to be noted that two separate paras have been allotted in the section to payments of interest and part payment of principal respectively and the words employed are also different. In case of payment for interest, three conditions have to be satisfied, e. g. (1) interest should be paid as such, (2) the payment must be before the expiration of the period, (3) that the person liable to pay the debt or his authorized agent should sign the indorsement of payment. In case of part payment of principal there is no stipulation that it should be paid as such, and it is enough if the conditions (2) and (3) laid above are satisfied.

The question has therefore arisen regarding the importance or otherwise of the words "paid as such" used in para. 1 of S. 20. According to one school of thought the words "as such" are merely redundant and as remarked by the dissenting Judges of the Allahabad High Court, they serve as "a typical example of sloppy draftsmanship" and the Courts ought not to attach any importance to the same. According to this school a literal adhesion to the precise language of this section would lead to the making of the enactment an absurd one,

and that therefore the words "as such" should be ignored in interpreting the language of the section. Hence where an indorsement of payment appears on the back of bond in the handwriting of a debtor or his agent and even if the indorsement does not say whether it is paid towards interest or principal, it is enough for this school to save limitation, inasmuch as the payment must be deemed to be either towards interest or in part payment of principal or partly towards interest and partly towards principal. On the other hand, the majority view of the Full Bench in A I R 1935 ALL 946,² and followed by the other school of thought is that the Legislature must be deemed to have been fully aware of the importance of the words "paid as such" used in para. 1 of S. 20, and its deliberate act in not deleting the same at the time of amendment by Act 1 of 1927, should naturally be interpreted as implying that the previous interpretation put upon the words has been accepted and retained by the Legislature. According to this view a payment on general account, more succinctly called "an open payment" by Lord Macmillan, which does not show whether it is made in part payment of principal or of interest, does not save limitation, under S. 20, Limitation Act.

Their Lordships of the Privy Council in A I R 1940 P C 63,¹ agreed with the view of the Full Bench in A I R 1935 ALL 946,² and has laid down that there are four possibilities in case of an open payment, as to the debtor's intention. They are : (1) Intention that the sum paid should go against interest, (2) that it should go against principal, (3) that it should go against both interest and principal, (4) no intention of appropriation as between interest and principal. Their Lordships also agreed with the view of the Full Bench in A I R 1935 ALL 946,² that the words "paid as such" have lost nothing of their previous meaning after the amendment. The term "paid as such" indicates that at the time of payment, the intention of the debtor must be shown to have been that the payment should go towards interest. Their Lordships also laid down that the intention of the debtor can be proved not only by the statements made by him at the time of payment, but also in another manner and may clearly appear from the circumstances of the case. In support of the said view their Lordships

1. ('40) 27 A I R 1940 P C 63 : 187 I O 239 : ILR (1940) Kar P C 184 : 67 I A 160 : I L R (1940) Lah 470 (P C), Ram Shah v. Lalchand.

2. ('35) 22 A I R 1935 All 946 : 159 I O 887 : 1935 A L J 1029 : 58 All 261 (FB), Udaypal Singh v. Lakshmi Chand.

cited a former decision of the Board reported in 42 C W N 509,³ wherein a letter was sent by the debtor to the decree-holder, requiring the latter to deduct the payment towards the first instalment with interest, due under the compromise decree. Their Lordships repelled the contention that the words "as such" can be either ignored or their meaning has changed and held that as the Legislature has decided to retain the same, "it is not reasonable as a matter of construction of a statute to suggest that they can be ignored," and further observed that the section has to be strictly construed and full effect has to be given to the words "as such" in applying para. 1 of S. 20, Limitation Act. Their Lordships also agreed with the view of Sulaiman C. J., in A I R 1935 ALL 946,² that Ss. 19 and 20, Limitation Act, are not based on any implied theory of acknowledgment found in English law. In A I R 1935 Mad 371,⁴ Venkatasubbarao J., following (1882) 19 Ch D 539,⁵ held that :

If a debtor makes a payment which the evidence discloses only in part, there being nothing in circumstances to show that he was unwilling to treat it as part payment, the Court may and does very properly infer that the payment implies an admission of right in the payee to the balance of the debt. Thus from a part payment unaccompanied by an express denial or repudiation, an admission of right may be inferred.

This contention has been expressly overruled by the Board. Hence it is clear that all those decisions of the Indian High Courts that held even if an indorsement of payment is not valid under S. 20, it can be treated as an acknowledgment of liability, are no longer good law.

The question now remains to see whether an "open payment" could be appropriated by the creditor either towards interest or principal, and thus save limitation under the Act. Their Lordships of the Privy Council held that under para. 1 of S. 20, the Legislature by the use of words "as such" has intended, that the intention of the debtor is to be the sole test in determining whether the payment should go towards interest as such, and thus save limitation. It follows that any appropriation by the creditor, in case of an open payment, towards interest, does not save limitation.

3. ('38) 32 S L R 415 : 172 I C 999 : 42 C W N 509 (P C), *Het Ram Bodh Raj v. Aya Ram Tola Ram*.

4. ('35) 22 A I R 1935 Mad 371 : 157 I C 259 : 68 M L J 73, *Appusami Pillai v. Morangam Muthirian*.

5. (1882) 19 Ch D 539 : 51 L J Ch 394 : 46 L T 356 : 30 W R 327, *Harlock v. Ashberry*.

But if the creditor appropriates the same towards part payment of principal the result is different. There is a marked contrast between paras. 1 and 2 of S. 20. The words "paid as such" are conspicuous by their absence in para. 2 of S. 20. It cannot therefore be said that the intention of the debtor is the sole test even under para. 2 of S. 20. In the absence of any intimation of the debtor's intention to the creditor, the creditor has under S. 60, Contract Act, a right to appropriate the same in the manner best advantageous to himself. The creditor can therefore appropriate the same towards principal and thus save limitation under S. 20. But their Lordships of the Privy Council definitely held that there should be actual appropriation of the same by the creditor, within the prescribed period. In the absence of any such actual appropriation by the creditor, it cannot be argued that a presumption of law can be drawn in favour of the creditor, that he should be deemed to have appropriated the same in the manner advantageous to himself. In short, in order to save limitation a notional appropriation cannot take the place of actual appropriation : A I R 1941 Mad 107.⁶ Their Lordships of the Privy Council also held that no notice of such appropriation need go to the debtor and it is enough to save limitation if by some overt act, the creditor has shown that he has within the prescribed period appropriated the same towards principal.

A qualification to the abovesaid principle can also be drawn from the remarks of the Privy Council itself. In a case, where by the date of payment, on account, the amount due as interest is less than what is paid and indorsed on the back of the document, can it save limitation ? It can be inferred when a debtor paid more than what is due as interest by the date of open payment, that he has intended the balance over and above what is due as interest should go in discharge of the principal. That such a contention can be validly raised is apparent from the remarks of the Board itself on p. 65 in A I R 1940 P C 63,¹ where their Lordships observed :

There is no room for the contention that the sum of Rs. 100 exceeded the amount of principal or interest outstanding in respect of the note at the date of payment so that part of it at least must of necessity have been intended to go towards interest or towards principal.

6. ('41) 28 A I R 1941 Mad 107 : I L R (1941) Mad 57 : (1940) 2 M L J 648, *Duraiswamy Iyengar v. Raghavachariar*.

On page 67 of the same report their Lordships further remarked :

Of course a payment of money may be shown to have been intended by the debtor to go in part at least towards the reduction of the principal debt by direct proof, e. g. by the fact that the amount of payment exceeded the interest then due.

Another possibility is a case where the debt does not carry any interest. In such a case, there is no difficulty at all because any payment made by the debtor should of necessity have been intended by him that it should go in part payment of principal, and as such it is enough to save limitation without any proof of express appropriation: *vide* A I R 1940 Lah 442.⁷ Another difficulty which might commonly arise in the minds of several persons is regarding the effect of the Privy Council decision in cases where the payment made is less than what is due as interest, and debtor indorses the same on the back of the document expressing that the same should go towards principal and interest. Such a payment in my view cannot be treated as an "open payment." It is not a payment on general account, where the debtor does not disclose his intention. As the debtor has expressed that the payment should go towards principal and interest, he has signified his intention that part of it should at least go in discharge of the interest due and that therefore such an indorsement satisfies the conditions laid down in para. 1 of S. 20. The term "paid as such" cannot be stretched as to include the words that interest should be paid alone or separately from what is due as principal. The Board in *Ramshah's case*¹ has laid down, that if from the statements of the debtor or from the circumstances of the case it can be inferred that the amount paid should go towards interest it is enough to save limitation. Where a debtor makes an indorsement of payment, expressing that the same should go towards principal and interest, it cannot be urged that the debtor has not intended that part of the payment should go towards interest. In fact, S. 20 does not lay down that the debtor should signify which part of the debtor's payment should go towards interest as distinct from what is due as principal. In 42 C W N 509³ the facts clearly disclose that a sum of Rs. 13,000 to-

gether with one year's interest thereon is due when a sum of Rs. 825 is paid by the debtor. Their Lordships of the Privy Council observed that :

The payment was made and necessarily made in respect of principal and interest; it was therefore a payment of interest on a debt as such by a person liable to pay the debt.

In the accompanying letter sent by the debtor to the creditor in the said case the former requested the latter to appropriate the same towards the first instalment together with interest. The abovesaid decision is cited by their Lordships in A I R 1940 P C 63¹ with approval, to show that the term "paid as such" cannot be ignored. It has also to be noticed that in 42 C W N 509,³ the payment was held sufficient to save limitation not because that the amount paid is more than what is due as interest but because that the debtor intended that the same should go towards principal and interest. It is therefore clear from the above discussion that the following points can be summarized : (1) where an indorsement of payment is sought to be treated as a payment towards interest, it must be paid "as such" and the intention of the debtor is the sole test and any subsequent appropriation by the creditor towards interest does not save limitation; (2) where the indorsement of payment is on general account and the amount paid is less than what is due as interest, the creditor can by express appropriation towards part-payment of principal, within the prescribed period, save limitation; (3) where the payment is on general account and the amount paid is more than what is due as interest, it is enough to save limitation, as it can be presumed that the intention of the debtor necessarily is that part of it should at least go towards principal; (4) where the debt carries no interest, any payment made thereunder can be safely presumed to be towards part-payment of principal, and as such it is enough to save limitation; (5) where the indorsement of payment shows, that the amount paid is towards principal and interest, though the sum paid is less than what is due as interest by the said date, it is enough to save limitation as it can be presumed from the words "principal and interest" embodied in the indorsement, that the intention of the debtor is that part of it should at least go in discharge of interest.

7. ('40) 27 A I R 1940 Lah 442 : 191 I C 817 : 42 P L R 638, *Kesar Singh v. Wazir Singh*.

POLICE INTERFERENCE IN PETTY CASES

by G. SRINIVASA AYYAR, B.A., *First Grade Pleader, Dindigul.*

The police have vast powers vested in them under the Code of Criminal Procedure in what are called cognizable cases and the general public will feel thankful to them if the police officers only exhibit zeal and diligence in cases which are properly within their field. It may be asserted without serious contradiction from the police officers themselves that they have hardly time enough to attend to their legitimate duties. Hence it is surprising to find of late a tendency on the part of the petty police officers to interfere in petty village quarrels and disputes and report to the Magistrates about such petty occurrences. No doubt, the law as laid down in S. 190, Criminal P. C., permits Magistrates to take cognizance of cases on the report of any police officer, though it may be said that the Magistrates are not bound to act on such reports as the word used in the section is 'may' and not 'shall.' But it is the common experience of all practitioners in criminal Courts that these reports, whatever may be the rank of the officers making the same, are invariably acted upon and taken on file as cases, and proceedings are instituted on their basis.

In most cases, police constables of the lowest rank make such reports when they go on beat duty and the poor villagers are put to much trouble and expense in defending themselves. The most favoured section of the Penal Code for reports is S. 160, 'Affray' and next in order comes S. 290 'Public nuisance.' The police constable cites himself as a witness and implicates a host of persons as accused, the persons assaulted and the persons assaulting being arrayed as accused in the same dock. The evidence of the police officer carries the day against the poor ryots. In the case of cognizable cases, many safeguards—whether sufficient or not—are provided in the Code against possible misbehaviour on the part of the police officers. First of all, the investigation is entrusted to experienced officers of rank and station who feel their responsibilities in life. The officer in charge of a police station has first of all to send a report of the case when he makes up his mind to investigate it, to the Magistrate. He has to send a copy of it to his superior officers. This is called F. I. R. Then as the investigation proceeds, he has to send daily reports as to what he does. Finally, he has to send his final report in the case to his superior officers and to the Magistrate. The Magistrate and

the superior officers may scrutinise these reports and offer such instructions as they deem necessary, during the investigation.

With all these safeguards, we often hear complaints of the high-handed acts of the police officers, whether deservedly or undeservedly. But in the case of the so-called petty cases reports of which are made by police constables, no investigation is made by responsible officers such as the Sub-Inspector, not to speak of the Circle Inspector, and there is no scrutiny of the truth or otherwise of the facts contained in the reports. The reports are simply forwarded to the Magistrate with what they call, in some cases, petty case charge sheet. Practically, the lower police officers have greater powers in petty non-cognizable cases to harass the poor villagers without any check over their possible misbehaviour. It need not be pointed out that any slight discourtesy—wilful or accidental—and disrespect, not to speak of open insult, offered to the police constable will at once rouse the ire of the police officer with the result that a report from his pen alleging facts constituting offence under S. 160 or S. 290, I. P. C., will be received by the Magistrate the next day or even some days after, if the efforts to settle the matter otherwise were to fail. No doubt, the High Courts have held that the reports made by police officers under S. 190, Criminal P. C., may be made by any police officer whatever his rank, and not the final reports made by investigating police officers only in cognizable cases: *vide* A I R 1926 Mad 865,¹ A I R 1928 ALL 765,² A I R 1928 Lah 66³ and A I R 1927 Lah 702.⁴ It is under the cloak of these decisions police officers of the lower ranks make the reports. In this connexion it may be pointed out that the judgment of Devadoss J. in A I R 1925 Mad 672⁵ anticipated all the mischievous implications in holding that 'report' was not confined to final reports in cognizable cases.

Further when such reports are made, the Magistrates are not required even to examine

1. ('26) 13 A I R 1926 Mad 865: 96 I C 983: 27 Cr L J 1031: 49 Mad 525: 52 M L J 210 (F B), *Public Prosecutor v. Ratnavelu Chetty.*
2. ('28) 15 A I R 1928 All 765: 111 I C 858: 29 Cr L J 938: 51 All 382: 1929 A L J 68, *Prag Dat v. Emperor.*
3. ('28) 15 A I R 1928 Lah 66: 106 I C 577: 29 Cr L J 65, *Emperor v. Wali Mohammed.*
4. ('27) 14 A I R 1927 Lah 702: 104 I C 487: 9 Lah 280: 28 Cr L J 821, *Shankar Lal v. Emperor.*
5. ('25) 12 AIR 1925 Mad 672: 90 I C 898: 26 Cr L J 1550, *In re Perumal Naick.*

the persons who make the reports on oath as is obligatory on the Magistrates to do when private complaints are made by private persons. If at least sworn statements are insisted on in cases of reports of non-cognizable cases also under S. 200, Criminal P. C., there is a chance of the truth of the reports tested at the earliest opportunity by the Magistrate and the report itself thrown out if the police officer does not support the facts contained in his report. Hence there is not even this safeguard against false and frivolous reports by petty police officers, and we are faced with the situation that absolute and uncontrolled powers are enjoyed by the police in non-cognizable cases. This could not have been the intention of the Legislature and the Legislature could not have anticipated such state of things. If such unfettered interference be tolerated in non-cognizable cases, why should there be any distinction at all between cognizable and non-cognizable cases and why should different procedures be prescribed for institution of proceedings by the Code? Section 155, Criminal P. C., says that when information is given regarding the commission of a non-cognizable offence, the police officer must refer the informant to the Magistrate and no police officer shall investigate a non-cognizable case without the orders of a Magistrate.

Then under what section of the Code are reports made in non-cognizable cases and under what section of the Code are the so-called petty case charge sheets sent? The police conscience seems to be satisfied that no such salutary procedure need be observed when a third class constable takes it into his head to make a report of a real or imaginary occurrence of a non-cognizable offence. This kind of flouting of the express provisions of law and circumventing of the same ought not to be tolerated any longer.

The troubles and inconveniences caused to poor ryots most of whom might not have seen full rupee coins and might not have visited towns where Courts of Magistrates are situated, when they are thus dragged to Courts, can better be imagined than described. But for the gratuitous interference of the police constable in village brawls, the concerned villagers will very soon make up their differences and become friends. The effect of such interference by the petty police officers and the consequent harassments of prosecutions in Courts is what was originally a wordy quarrel develops into a big permanent feud resulting in very grave crimes. Again when once they are dragged to Courts, the parties could not compromise the matter as is done in private complaints. What is only a petty assault if complained by a private person, becomes an offence against public peace when reported by a constable and is not compoundable. There is also another anomaly. Criminal Courts are competent under S. 250, Criminal P. C., to award compensation to be paid to accused by the complainants in private cases, if the complaints be found to be false, frivolous and vexatious, and it is doubtful if such compensation can be awarded when the police officer makes a report and proceedings are instituted thereon.

It is high time that the Inspector General of Police should at once issue stringent circulars prohibiting at least police officers of the lower ranks, such as constables, from making reports in petty cases in villages and whenever such reports are found necessary, it should be strictly enjoined on the officers in charge of police stations that they should verify the truth of such reports before forwarding them to the Magistrates. The Legislature may also interfere and suitable amendments may be made in the provisions of the Code.

THE ARBITRATION ACT, 1940, AND ITS EFFECT ON THE PRACTICE FOR AWARDS UNDER THE CO-OPERATIVE SOCIETIES ACT

by DIWAN BAHADUR K. V. BRAHMA, C.I.E., M.B.E., *Advocate, Nagpur.*

The Arbitration Act, 10 of 1940, which came into force in British India from 1st July 1940, has introduced important changes in the practice so far followed under the Co-operative Societies Act for decisions on the disputes between members of societies

and the societies. It is worth while noting the changes and if necessary to get suitable amendments made in the rules framed by the Provincial Governments under the Act. The changes are brought about by two sections of the Arbitration Act, viz., ss. 46

and 47. Section 46 of the Act runs as follows :

The provisions of this Act, except sub-s. (1) of S. 6 and Ss. 7, 12 and 37 shall apply to every arbitration under any other enactment for the time being in force, as if the arbitration were pursuant to an arbitration agreement, and as if that other enactment were an arbitration agreement, except in so far as this Act is inconsistent with that other enactment or with any rules made thereunder.

Arbitrations under the Co-operative Societies Act will, therefore, be governed by the provisions of the Arbitration Act except where its provision is inconsistent with any section of the Co-operative Societies Act or with any rules framed thereunder, in which case the provisions of the Co-operative Societies Act or the rules thereunder will prevail. The sections which are not made applicable to arbitration under the Co-operative Societies Act are :

(i) Sub-section (1) of S. 6 which says that an arbitration agreement is not discharged by the death of a party and that it is enforceable by or against the legal representative of the deceased party. (ii) Section 7 provides for insolvency. (iii) Section 12 relates to the power of Court to appoint an arbitrator when an arbitrator is removed by it. (iv) Section 37 says that the provisions of the Limitation Act, 1908, shall apply to arbitrations as they apply to proceedings in Court.

It is important to note from the above that the law of limitation is not made applicable to arbitrations under the Co-operative Societies Act with the result that the Registrar or the arbitrators appointed by him may when deciding disputes ignore the defence of limitation raised by a party to a dispute. But as pointed out by Diwan Bahadur Brahma in his Book on the Law of Co-operative Societies in India, Edn. 2, p. 157, it is desirable in view of the Privy Council decision in A I R 1929 P C 103,¹ that claims barred under the Limitation Act should not be rejected by an arbitrator. In other words the law of limitation should not be ignored. The defence of limitation is not an inequitable defence and it should be allowed.

Section 47, Arbitration Act, provides as follows :

Subject to the provisions of S. 46 and save in so far as is otherwise provided by any law for the time being in force, the provisions of this Act shall apply to all arbitrations and to all proceedings thereunder.

Provided that an arbitration award otherwise obtained may with the consent of all parties interested be taken into consideration as a compromise or adjustment of a suit by any Court before which the suit is pending.

1. (29) 16 A I R 1929 P C 103; 115 I C 713; 56 Cal 1048; 56 I A 128 (P C), Ramdutt Ramkisan Das v. E. D. Sassoon & Co.

The combined effect of Ss. 46 and 47 is that the principles and procedure laid down in the Arbitration Act will apply to all arbitrators under any Act and to the proceedings taken by the arbitrators under that Act. The proceedings for deciding doubts and disputes between members and societies under the Co-operative Societies Act are therefore to be according to the principles and procedure under the Arbitration Act so far they are not inconsistent with a definite provision laid down by or under the Co-operative Societies Act. The provisions under the Co-operative Societies Act or rules thereunder are thus left untouched but in cases where there is no provision made under the Co-operative Societies Act or where the provision of Arbitration Act is not inconsistent with a provision under the Co-operative Societies Act or rules thereunder, the provision under the Arbitration Act is to be followed.

Rules relating to arbitration and award framed under the Co-operative Societies Act in the provinces in India provide for the following :

(a) Power of Registrar to decide a dispute himself or to refer it for decision to one or more arbitrators. This rule remains intact notwithstanding the implied condition in Sch. 1 to the Arbitration Act, to the effect that the reference is ordinarily to be to a sole arbitrator.

(b) Rules lay down the powers of the Registrar or arbitrators appointed by him as below : (i) to administer oaths (ii) to require attendance of parties and witnesses and (iii) to require the production of books or documents by a summons sent by registered post.

Section 13, Arbitration Act, says that the powers of the arbitrator are : (i) to administer oath, (ii) to state a special case for opinion of the Court on any question of law, (iii) to make the award conditional or in the alternative, (iv) to correct any mistake or error arising from any accidental slip or omission, (v) administer interrogatories to any party. Of these, Nos. ii to v are in no way inconsistent with the provisions of the rules under the Co-operative Societies Act and that these powers therefore may be regarded as conferred on Registrar or arbitrators appointed by him to decide a dispute. While on this point it is desirable to consider the conditions implied under an arbitration agreement stated in Sch. 1, Arbitration Act.

As will be seen from S. 46 quoted above, the Co-operative Societies Act itself is to be treated as an arbitration agreement and so the implied conditions enumerated in Sch. 1 would be implied in the reference of an award under the Co-operative Societies Act. The implied conditions are: (i) Unless otherwise provided the reference is to be to a sole arbitrator. (ii) If the reference is to an even number of arbitrators, the arbitrators are to appoint an umpire within a month. (iii) The arbitrators must make their award within four months after 'entering on the reference' which words are understood to mean the day when the arbitrators begin to enquire into a case or when they are called upon by notice in writing by parties to do so: 44 ALL 482.² (iv) If the arbitrators fail to make an award in the time allowed the umpire is to make it within a further period of two months. (v) Parties to the reference must submit themselves for being examined and must produce all documents and papers and do all other things which the arbitrators or the umpire may require them to do. (vi) The award is final and binding upon all parties. (vii) The costs of reference and award are to be in the discretion of the arbitrators or umpire and they are to determine by whom and in what manner the costs may be paid. None of the above implied conditions is inconsistent with the provisions of the Co-operative Societies Act or rules thereunder and they would therefore apply to the proceedings for award under the Co-operative Societies Act. The most important condition of these is which requires the arbitrator to make the award within four months or within further time allowed by Court. As the Registrar is not subordinate to any Court he need not go to any Court to obtain extension of time but the arbitrators appointed by him must seek extension of time from him if they are unable to make an award within four months. The principle underlying is that arbitrators must act expeditiously and with due diligence. The consequence of delay is stated in S. 11, Arbitration Act, which says that the Court may, on the application of a party, remove an arbitrator if he fails to use all reasonable despatch in the proceeding. This condition would apply to awards under the Co-operative Societies Act as there is nothing in it which conflicts with the Co-operative Societies Act or rules thereunder.

The Arbitration Act confers on a party to a reference the power to move a Court for the removal of an arbitrator. So long as the Registrar is deciding disputes himself the question of removing the arbitrator does not arise. But rules under the Co-operative Societies Act say that disputes between members of societies and societies must be decided by the Registrar himself or by arbitrators appointed by him. When the Registrar chooses to appoint arbitrators it is conceivable that the Court gets the power of removing an arbitrator if he fails to exercise due diligence in the proceedings of the award. In such a case the Registrar may himself remove an arbitrator who is too lazy to comply with the provisions of the Arbitration Act.

(c) Rules embody provisions in the nature of procedure to be followed in making an award under the Co-operative Societies Act. These are not affected by the Arbitration Act. Section 14, Arbitration Act, however lays down that the arbitrators are, not only to sign the award, but they are bound to give notice in writing that they have done so and also to state to the parties the amount of fees and charges payable in respect of the arbitration and the award. This section further lays down that the arbitrators are bound on payment of proper expenses to file an award in the Court and the Court is thereupon to give notice of the filing of the award to the parties concerned. As there is nothing inconsistent in this with Co-operative Societies Act or the rules thereunder, this provision will also apply to the awards under the Co-operative Societies Act.

(d) A very important change made by the Arbitration Act in respect of an award is stated in S. 17, Arbitration Act, which lays down that on every award the Court must pronounce a judgment in consonance with the award and upon the judgment so pronounced a decree is to be drawn up. There is to be no appeal from such a decree except on the ground that it is in excess of or not otherwise according to the award. Under the rules under the Co-operative Societies Act, a party aggrieved by an award has a right to appeal to the Registrar within a month, and it is said that the decision of the Registrar or the award of the arbitrator when not appealed from cannot be questioned by any civil or revenue Court. Section 17, Arbitration Act, lays down that a judgment and a decree are to be made in pursuance of the award. This provision is

2. ('22) 9 AIR 1922 All 106 : 66 I O 907 : 44 All 482 : 20 A L J 272, Sardarmal Hardatt Rai v. Sheo Bakhsh Rai Sri Narain.

not inconsistent with the rules under the Co-operative Societies Act. The parties to a dispute in the case of awards under the Co-operative Societies Act, are the societies on the one hand and individual members of societies on the other. The society or the member who gets the award has now a right of calling upon the Registrar to file the award in the Court, and the party has also the right to ask the Court to pronounce judgment in terms of award, and to make a decree on it. When such a decree is made it cannot be challenged by an appeal. Prior to the enactment of the present Arbitration Act, 10 of 1940, there was no such provision in India. The provision is new and applies to all awards made under any other enactment. Sections 15 and 16, Arbitration Act, invest the Court with the power to correct an award when there are obvious errors which can be corrected without affecting the decision on merits. The Court has also been given a power to remit an award on certain grounds specified in s. 16. This section will also apply to awards under the Co-operative Societies Act.

(e) The rules under the Co-operative Societies Act say that an award under the Co-operative Societies Act is to be executed by a Court as if it was a decree of the

Court. This now goes out of existence as what is to be executed is the decree passed by the Court and not the award.

(f) Rules under the Co-operative Societies Act do not allow legal practitioners to appear before the Registrar as of right. This provision is not affected by the Arbitration Act. Sections 20 to 25, Arbitration Act, have no application to awards under the Co-operative Societies Act and therefore it is not necessary to consider them. Section 26, Arbitration Act, says that ss. 27-38, Arbitration Act, apply to all arbitrations. These provisions are as under : Section 27 — This gives an arbitrator the power to make an interim award. Section 28 gives the Court the power to extend time for making award. Section 29 gives power to a Court to grant interest after the decree. Section 30 puts down the grounds on which an award may be set aside. The grounds are : (i) An arbitrator misconducting himself; (ii) making an award after the arbitration is superseded by a Court; (iii) procuring an award improperly, or (iv) when the award is otherwise invalid. It is obvious that before an award can be set aside a party must apply to the Court and prove the reason for setting it aside.

(To be continued.)

REVIEWS

Indian Company Law (2nd Edn.), by M. J. SETHNA, BARRISTER-AT-LAW, 251, Tardeo Road, Bombay. Published by author himself. The book can be had from Messrs. Taraporewala Sons & Co., Bombay. Pages 712.

This edition is a much revised and enlarged one and, unlike the previous edition which was primarily meant for students, is intended for lawyers and to advanced students. The commentaries are lucidly written and can be understood even by businessmen. English and Indian case law have been referred to in their appropriate places in the body of the book and reference to the section of the Companies Act has also been given. The text of the Act as amended up-to-date together with forms, tables, schedules is also given. The appendices contain several useful matter which greatly adds to the practical utility of the book. We are sure that this edition will meet with great popularity at the hands of the legal profession and businessmen. The printing and get-up are good.

The Debt Laws in U. P. by SHAMBHU DAYAL SINGH, M. A., LL. B. Published by

Ram Narain Lal, Law Publisher, Allahabad. Pages 192. Price Rs. 2-8-0.

In the body of the book the two important Acts relating to debts viz., Debt Redemption Act, 1940, and Regulation of Agricultural Credit Act, 1940, have been dealt with. Summary of the important provisions and commentaries to the sections have been given. The rules framed by the Government have also been usefully included. The Appendices contain Agriculturists Relief Act, 1940, Temporary Postponement of Execution of Decrees Act, 1937, Usurious Loans Act, 1918, with notes based on up-to-date case law. The book is bound to be of great use to lawyers in the United Provinces.

The Law College Magazine, Poona. Vol. IV, No. 1 for October 1941. Edited and published by K. V. DIKSHIT, B.A., LL.B., at the Law College Poona. Subscription Rs. 2 per year or Re. 1 per issue.

We acknowledge with thanks the receipt of the above part. As usual it contains number of articles in different languages viz., English, Marathi, Hindi, Gujrathi, etc.

THE ARBITRATION ACT, 1940, AND ITS EFFECT ON THE PRACTICE FOR AWARDS UNDER THE CO-OPERATIVE SOCIETIES ACT.

by DIWAN BAHADUR K. V. BRAHMA, C.I.E., M.B.E., *Advocate, Nagpur.*

(continued from page 104)

Section 31, Arbitration Act, says which Court has jurisdiction in respect of an award. That Court is the Court which has the territorial and pecuniary jurisdiction over the subject-matter of the award. Section 32 bars a civil suit to question an award. The only remedy to challenge an award is to apply to the Court which has jurisdiction; this is laid down in S. 33. Sections 34 to 35 do not concern the Co-operative Societies Act. They lay down powers of Court in certain respects and describe the effect of legal proceedings on an award. Section 37 makes the Limitation Act applicable to proceedings for an award, but it does not apply to awards under the Co-operative Societies Act. However, as said above, it is desirable to take notice of the defence of limitation as advised by the Privy Council.

Section 38 gives the Court the power to decide the disputes between an arbitrator and a party to the award as regards fees payable to the arbitrator.

Section 39 provides appeals from certain orders of the Court. Section 40 says a Small Cause Court has no power in respect of an award. Section 41 says the civil Court will follow the Code of Civil Procedure and the Court will have the powers it has under the Code. Section 42 relates to service of notice. A notice, the section says, may be served by registered post or delivered per-

sonally. Section 43 is about the power of Court to order summonses to parties or witnesses. Section 44 gives power to High Courts to frame rules and S. 45 says the Crown is bound by the Act. Sections 46 and 47 are already detailed above. Section 48 says that pending references are not affected by the Arbitration Act and S. 49 speaks of repeals and amendments.

There are four schedules to the Act. Schedule 1 lays down the conditions implied in every arbitration agreement. These apply to the awards under the Co-operative Societies Act as the Co-operative Societies Act itself is to be taken to be an arbitration agreement. Schedule 2 enumerates the powers of Courts. Schedule 3 says which Acts are repealed and Sch. 4 says which Acts are amended.

To sum up; the important changes brought about are that awards must be made within four months. The parties have the right to get an award filed in Court and to get a judgment and decree of the Court on it and then to execute the decree. The awards under the Co-operative Societies Act will not be executed by Courts as hitherto.

It is desirable that the rules under the Co-operative Societies Act should be suitably overhauled so as to bring them into conformity with the provisions of the Arbitration Act.

THE SUCCESSION CERTIFICATE TO A GUARDIAN OF A MINOR.

35 Bom L R 950=('33) 20 A I R 1933 Bom 436 discussed.

by K. B. GAJENDRAGADKAR, B.A. (HONS.), LL.B., *Pleader, Satara City.*

When the succession certificate is to be granted to a minor, it is generally granted to a guardian of the minor. The question for consideration is whether it should be granted to the natural guardian of the minor like the mother, brother, etc., or whether the guardian must be one appointed under the Courts of Wards Act. As far as Bombay Province is concerned, the leading case on this point is 35 Bom L R 950¹ which has decided that the succession certificate can be issued to a guardian of a minor only if such guardian is appointed a guardian of the minor's property under the Guardians

and Wards Act. It is proposed to discuss that case here. In the Bombay case under discussion, it is humbly submitted, their Lordships came to the conclusions because they ascertained the practice in the High Court which was to grant the certificate only when the guardian has been appointed under the Guardians and Wards Act. They also relied on the direct authority of the Bombay High Court in 25 Bom 528.²

Even the mofussil Courts in the Province almost blindly follow this decision and refuse to grant a succession certificate to a natural guardian of the minor like the

1. ('33) 20 A I R 1933 Bom 436 : 145 I O 588 : 35 Bom L R 910, In re Narayan Khanderao.

1941 J/14

2. ('01) 25 Bom 528 : 3 Bom L R 795, Gulabchand v. Moti.

mother. In 25 Bom 523,² a case completely relied on, their Lordships only decided that the Act does not permit the issue of a certificate to the guardian of the minor *without requiring any security*. This case was heard by Sir Lawrence Jenkins C. J. and Ranade J. Jenkins C. J. observed in the course of the judgment :

In the next place he (District Judge) has granted a certificate to the applicant as guardian of the minor without requiring any security which was obviously improper.

Ranade J. has said :

The District Judge . . . passed order in favour of Moti, the minor's natural father as guardian without taking security as provided by S. 9.

In short 25 Bom 523² only decides that the certificate must not be granted to the guardian of the minor without taking any security. It nowhere says that the guardian must be one appointed only under the Guardians and Wards Act. Even in 35 Bom L R 950¹ Beaumont C. J., says :

In that case the Court held that a succession certificate can be granted to the guardian of the minor who had been appointed as such under the Guardians and Wards Act; *but the case did not decide that the certificate could not be granted in the absence of such an appointment.*

In the face of this statement one wonders how the Chief Justice comes to the conclusion that :

We have the direct authority of this Court in 25 Bom 523² that a certificate can be granted in such a case and we think that the correct course is to follow the decision in that case and require the guardian to be appointed under the Guardians and Wards Act before the certificate is granted to her.

It is humbly submitted that 25 Bom 523² does not warrant this conclusion that the guardian must be one appointed under the Guardians and Wards Act. In 36 Mad 214³ it is held that the succession certificate can be granted to a minor on an application made by him through his natural guardian. Therein it is held :

Apart from S. 9, Succession Certificate Act (Act 7 of 1889) there is nothing in the Act which precludes a minor from applying for a certificate while we find that Ss. 8 to 13, Probate and Administration Act (Act 5 of 1881) prohibit grants of probate and letters of administration to minors. Section 9 no doubt lays down that whenever the Courts consider it desirable to take security from the applicant it shall require him to execute a bond with two sureties and it is argued that as the minor cannot execute such a bond it must be held he is incompetent to apply for a certificate. The execution of the bond by the guardian on behalf of the minor would bind the minor and thus satisfy the provisions of S. 9. This section therefore does not present any serious difficulty.

3. ('12) 36 Mad 214 : 15 I C 408 : 1912 M W N 411, Krishnamacharlu v. Venkatamma.

The provisions of the Succession Certificate Act have now been repealed and are substituted by Ss. 214 and 370 to 390, Succession Act (Act 39 of 1925). The introduction of the words "on succession" in S. 214, cl. (a) corresponding to S. 4 (a) of the old Act is only intended to make it abundantly clear that the section refers to succession as opposed to survivorship among Hindu coparceners. There is really nothing in either the old Act or the provisions of the consolidating Act 39 of 1925 to justify the Court in holding that an application by the minor for the grant of a certificate is incompetent. On the contrary it would appear that as Ss. 223 and 236 of the new consolidating Act of 1925 expressly prohibit the grant of probate and of letters of administration to minors and as it contains no provision excluding the grant of a succession certificate to a minor, the maxim *expressio unius est exclusio alterius* (mention of one is exclusion of another) applies and it may well be presumed that the Legislature intended to permit the issue of a certificate to a minor.

Section 141, Civil P. C., provides that the procedure laid down in the Code with regard to suit shall, as far as it can be made applicable, be allowed in all proceedings in any Court of civil jurisdiction and it would therefore appear that there is nothing to prevent the application for a certificate being made on behalf of a minor by his next friend. Further it should be seen that O. 32, R. 6, cl. (2) clearly contemplates permission being granted to the next friend to receive money or other property of the minor outside Court by way of compromise before the decree or order or to receive the same under the decree or order passed in favour of the minor. Such leave however may perhaps not be granted to a next friend who has not been appointed a guardian under the Guardians and Wards Act unless he gives such security as will, in the opinion of the Court, sufficiently protect the property from waste and ensure its proper application.

These provisions may well be read in conjunction with the provisions of S. 9, Succession Certificate Act, corresponding to S. 375 of the Act of 1925. If this is done the only serious objection to the grant of a certificate to a minor through his next friend would disappear. The next friend would not only be required to furnish security that the money recovered on behalf of the minor in pursuance of the certificate would be properly applied for the benefit of the minor, but that he would also indemnify

any persons other than the minor who may be entitled to the whole or any part of the debt. The application therefore for a succession certificate in the name of the minor represented by his next friend is quite competent and the interests of the minor may well be safeguarded by the Court by requiring the next friend who is not the certified guardian to execute a bond both under S. 375, Succession Act (Act 39 of 1925) and under O. 32, R. 6 (2), Civil P. C.

The Bombay case under discussion has not considered all these sections of the Act as well as the Civil Procedure Code. It is based mainly on the consideration of the practice prevalent on the original side of the High Court. It cannot therefore be, strictly speaking, quoted as a direct authority in the similar cases in the Courts in the mofussil.

It is very hard for the minor sons of the deceased to get the Succession Certificate for the realization of the debts due to their father. This process itself involves considerable delay and expense too. In addition to these, even the natural guardians of the minor like the mother or the brother is

again asked to get the guardianship certificate from the competent Court before they can qualify themselves to apply as the guardian of the minor for the succession certificate. This process involves again additional expense, time and trouble too.

In many cases the minors are solely dependent on the money to be recovered from these debts due to their father. They cannot of course do so, unless the formalities of the guardianship application and the succession certificate are gone through. This is most harassing indeed. It is high time that the Bombay High Court now reviews its own decision given in 35 Bom L R 950¹ by a Full Bench. It must consider the sections of the consolidated Indian Succession Act 1925 and the relevant sections of the Civil Procedure Code. It must also consider all the case law on this point of different High Courts. The case reported in A I R 1927 Sind 187⁴ can be well considered in this respect. It discusses the whole case law as well as the statute law.

4. ('27) 14 A I R 1927 Sind 187 : 101 I C 166 : 22 S L R 206, In re Sundar Das.

A NOTE ON THE SLAUGHTER OF वृषोत्सर्ग BULLS

by V. V. DESHPANDE, Benares Hindu University.

वृषोत्सर्ग is enjoined on the Hindus as a नित्यविधि and as a काम्यविधि also; thus, निर्णयसिन्धु says स नित्यश्च काम्यश्च.* नित्यवृषोत्सर्ग has to be performed on the eleventh day of the death of a relative (as a part of the funeral ceremonies) by him who is eligible to perform them.¹ काम्यवृषोत्सर्ग may be performed on any of the following days considered auspicious in this behalf :— Kartika & Magha Ayana; Ashwini Pournima; Chaitri Tritiya and Vaishakhi Dwadashi.²

The bull is to be released after its due consecration by the Vedic Mantras. A mention of the following important items in the ceremony will be useful in obtaining a clear idea of the Hindu view of the legal incidents arising out of it. A bull of parti-

cular description and age and whose mother cow is alive is to be chosen; it is to be branded on its flanks with special auspicious signs;³ then sacred fire is to be kindled and the रुद्र deity is to be invoked;⁴ a षोडशोपचार-पूजा is to be next offered to the bull accompanied by a recitation of appropriate Vedic Mantras. During the continuance of the worship select Vedic Mantras investing the bull with sacred character are to be recited in both of its ears. The bull is to be bedecked with suitable appurtenances (such as a bell, etc.) and ornaments. When in this way the bull becomes endowed with a super-sensuous attribute it is to be held by its tail with his left hand by the Yajman, and with his right hand water together with sesamum, gold and kush grass should be poured on the ground in the vicinity of the

*See also श्राद्धमयूख, धर्मसिन्धु and other works.

1. षट्त्रिंशन्मतम् :— एकादशेहि प्रेतस्य यस्य नोत्सृजेत वृषः । प्रेतत्वं सुस्थिरं तस्य दत्तैः श्राद्धशतैरपि ॥ and कूर्मपुराण :— एष्टव्या बहवः पुत्रा यद्येकोऽपि गयां व्रजेत् । यजेत चाश्वमेधेन नीलं वा वृषभुत्सृजेत् ॥

2. भविष्यपुराणम्.

3. भविष्योत्तरपुराणम् :— ततो वामे त्रिशूलं दक्षिणे शङ्खमालिखेत् ।

4. पारस्करः । :— रुद्रान् जपित्वा आज्येन स्थापयेत् रुद्रदेवतम् ।

bull.⁵ While doing this the performer should pronounce the name and the gotra of the departed and say that this bull, duly consecrated with the Vedic Mantras, and released in his name, may protect him always. The release of a bull should be accompanied by the release of at least four young cows with it. The person who performs वृषोत्सर्ग is praised in very high and eulogistic terms.⁶

Two points of importance as arising out of this ceremony present themselves for consideration. They are these: (a) With what special attribute, if any, is the bull invested after its due consecration by the Vedic Mantras? and (b) does the release of the bull entail a total extinction of the ownership of the Yajman so as to render the bull a "*ferae naturae*" capable of being appropriated by anyone?

Let us examine the first question. The nature of the transaction of the release of a bull in वृषोत्सर्ग is not similar in its legal incidents with the nature of the transaction involved in the वृषदान ceremony to a Brahman. वृषदान is one of the महादान् required to be made to suitable Brahmans on the death of a person. In the case of this pious gift of a bull, the bull is treated as a mere article of property. The Brahman is the donee; it is he who is to be honoured with षोडशोपचारपूजा, the donor makes the gift of the bull by making a declaration of the renunciation of his ownership over it in favour of the donee; the Brahman donee accepts the gift and on acceptance the gift becomes completed. There is a complete transfer of dominion over the bull from one person to another. All rights and liabilities of the donor arising out of the ownership are legally determined on the gift becoming complete.

In the वृषोत्सर्ग ceremony the bull is not given in gift to anyone; neither to a sen-

tient nor to a non-sentient being.⁷ It is not treated as an article of property at all. If the description of the ceremony as given in various sacred works were to be carefully examined it would be amply clear that the bull itself is to be invested with the sacred character of नन्दी, the sacred वाहन of the रुद्र deity.⁸ Then it is to be worshipped with Vedic Mantras.⁹ Over and above this, some Vedic Mantras are to be solemnly recited in the ears of the bull while the worship continues. This makes the investment of the bull with the super-sensuous attributes complete.

It is well-known that an image made of a block of wood or stone or metal becomes invested with the divine character of any particular deity when the प्राणप्रतिष्ठा of that deity is made in the image with the help of appropriate Vedic Mantras. It is the Vedic Mantras alone that are capable, with their mysterious force, of endowing any ordinary object with any super-sensuous or non-sensuous attribute. It is the राज्याभिषेक performed with Vedic Mantras that creates in any individual belonging to the Kshatriya class the non-sensuous attribute of a "King." It is a marriage performed with Vedic rites (विवाहहोम् etc.) that creates in an unmarried girl the non-sensuous characteristic of a पत्नी. It is an adoption accompanied by the Vedic दत्तहोम् alone that creates the non-sensuous relationship of son and father between two individuals who did not bear this relationship previous to the adoption and the boy an acknowledged son of a third party. If each of these respective ceremonies were not performed in strict accordance with the prescribed ritual and accompanied by the solemn recitation of the Vedic Mantras together with the minds of the parties performing the ceremonies with full faith pinned on the efficacy of the same, the respective special attributes and relationships would certainly fail to arise. On the other hand if they are duly

5. पारस्करः—सव्येन पाणिना पुच्छं समालम्ब्य वृषस्यतु
दक्षिणेनाम् आदाय सतिलाः ततः ॥
प्रेतगोत्रं समुच्यार्य अमुकस्मै इति ब्रुवन् ।
वृष एष मया दत्तः तं तारयतु सर्वदा ॥
सहेम सतिलं भूमौ इत्युचार्य विनिक्षिपेत् ॥

6. देवीपुराणम् :—एवं कृते वृषोत्सर्गे फलवाजिमखोदितम् ।
यमुद्दिशोत्सृजेन्नीलं सलभेत परां गतिम् ।
वृषोत्सर्गः पुनात्येव दशातीतान्
दशापरान् ॥

7. Besides the वृषोत्सर्ग and the वृषदान ceremonies, there is a third ceremony enjoined on the Hindus where a bull is to be dedicated to a temple-deity. The gift is made to a non-sentient being, the deity.

8. A नील bull is to be chosen and it is to be branded with त्रिशूल and शङ्ख on its flanks. It is well-known that the deity शङ्कर is always described as नीलकण्ठ or नीलवर्ण and त्रिशूल and शङ्ख are the favourite weapons of the deity.

9. This fact alone is sufficient to prove the endowment of the bull with sacred character, such a worship being not offered to any one not so endowed.

performed the Shastras do hold and the Hindus do firmly believe that the particular objects become immediately invested with the peculiar attributes contemplated about them at the time of the performance of those ceremonies.

The consecration of the bull with the appropriate Vedic Mantras endows it immediately with a peculiar sacred attribute. It no longer continues to belong to the category of "property." Henceforward it is "legal person" similar in nature to a consecrated image.¹⁰ The Hindu idea is that the deity of नन्दी the sacred वाहन of श्री शंकर resides in the bull so consecrated so long as it is alive. The verses in आदित्यपुराण, ब्रम्हपुराण, कालिकापुराण, विष्णुधर्मोत्तर, etc., make this clear. As soon as the bull ceases to belong to the category of "property" and is endowed with the character of a "legal person" it cannot remain into the ownership of anyone. It becomes freed from the ownership of the former owner (just as a consecrated idol is freed) not because there was an उत्सर्ग performed in its connexion but because of the fact of consecration and endowment with super-sensuous character. The legal incidents arising in the case of a वृषोत्सर्ग bull are identical in every respect with those of an idol. The bull like the idol is capable of holding property of its own. The property and the affairs of an idol are held and looked after by its shebait. Similarly in the case of a वृषोत्सर्ग bull there must be some one to protect and look after its welfare. Is the former owner capable and legally entitled to do this after the renunciation? This brings us to an examination of the second question raised above.

Strictly speaking, a consideration of the second point does not arise at all, once it is established that the consecrated bull becomes endowed with some special super-sensuous attribute and is to be recognized as a "legal person" by itself. For though there might be a distinction of the ownership of the former owner, the "thing" has become converted into a "person" and obviously there is no change from "property" to "*feræ naturæ*" or no property. However

a discussion of the legal incidents arising out of the transaction is essential as the analogy of the gift can be usefully applied to this transaction as well.

Gift is defined by Hindu Jurists as स्वस्वत्वधंसपूर्वक परस्वत्वापत्तिकलकचेतनोद्देशपूर्वकत्यागो दानम्.¹¹ From this definition the following becomes evident: (i) renunciation of ownership in favour of another; (ii) that another should be a sentient being himself or should be capable of being represented by a sentient being; and (iii) acceptance of the gift by some sentient being on behalf of the donee.¹² Thus the gift is complete only on the acceptance. All the rights and liabilities arising out of the legal condition of the ownership of a thing completely determine in the case of one individual then only when they take their rise in some other individual. This takes place at the moment when the donee becomes invested with the ownership of the thing gifted. This cannot happen before the declaration of its acceptance by the donee. The transfer of ownership even in the case of a thing gifted cannot, according to Hindu Jurists, take effect on a unilateral declaration to that effect by the donor and so they have always held that a declaration of its acceptance is essential to make it complete.¹³ So in cases where some

11. मित्रमिश्र : in वारिमित्रोदय :

12. If the donee is himself a sentient being then the acceptance should be by him.

13. In western systems of jurisprudence it is only the rights of an individual over a particular item of property which arise out of its ownership that are taken into consideration. So an owner can legally destroy anything which belongs to him. In the Hindu system things are altogether different. As soon as a person comes into the ownership of a thing a jural relation is established there and then, and the person is only entitled to utilize the thing in such a manner as would be directly or indirectly beneficial to the society. According to Hindu legal ideas the ownership of property entails, along with the advantageous rights, various kinds of duties and liabilities having reference to the special position or special function which the particular item of property or its owner (for the time being) might be occupying or fulfilling in the society. It is on this basis that the Hindu Jurists discuss the fitness or the unfitness (1) of the donees; (2) of the things to be gifted; and (3) of the donors, as well, in making the gift. A further detailed discussion of this will lead us into the mazes of philosophical speculations about the Hindu fundamental legal concepts, not strictly relevant to the problem in hand: see Gautam:— प्रतिभुत्यापि अधर्मे संयुताय न दद्यात् and the verses यशार्थं द्रव्यमुत्पन्नम् etc.

10. The performer of the ceremony releases the bull from his ownership with an appropriate gesture and formula but this only evidences his intention of discontinuing the ownership which was already lost by the consecration of the bull. Anyhow the outward and public manifestation of the loss of 'ownership' is essential to give to the ceremony a finished character and to remove all possible doubts.

time elapses between the action of renunciation of the ownership of a thing by the donor and the action of its acceptance by the donee, there is a sort of onerous ownership which inheres in the donor. The donor is at liberty to renunciate the advantages gained through the rights arising out of the ownership of a thing. But he is not at liberty to shake off the disabilities arising out of the ownership of the property. The society is interested in preventing him from the free exercise of such a choice. The result is that during this period the donor loses the right of enjoyment as well as that of its disposal while he is still burdened with the duty (or right) of the custody and the upkeep of the property on behalf of the society in general and the donee in particular. He is thus entitled and obliged to prevent anyone besides the donee from appropriating the same by seizure or finding. The Hindu Jurists have defined this kind of ownership as परिपालनायत्वरूपस्वत्व or "ownership for the purpose of care and custody of the property."¹⁴ This ownership determines on the donee making the gift complete by acceptance.

In cases of gifts in favour of idols and other non-sentient legal persons they are completed on their acceptance by some one such as a shebait, a manager or a trustee, duly authorized to do so. If there were no one to signify acceptance and thus make the gift complete the परिपालनायत्वरूप स्वत्व would certainly continue to inhere in the donor ; and thus he would be legally entitled to prevent others from the appropriation or enjoyment of the property which he intended to dedicate to the idol. Here it should be noted that as far as the beneficial effects of the ownership are concerned, the transfer is complete so that the transferor will himself not be entitled to enjoy the benefits arising out of the transferred thing.

But if he is not so entitled no one besides the donee is so entitled and the society in general and the transferor or donor in particular are legally interested in preventing its wrongful enjoyment by others. Thus he would automatically become a trustee (or at least a legal manager) of the thing dedicated to the idol (since the cessation of ownership in him was not complete on account of the want of acceptance by some-

one on behalf of the idol).¹⁵

वृषोत्सर्ग bull is invested with a juristic personality and the beneficial rights arising out of the ownership of such a bull cease to inhere in the उत्सर्गकर्ता as soon as the consecration is complete and the bull is released. The performer of the ceremony will not be entitled to enjoy the use of the animal in any way. But as the bull acquires a character similar to that of a consecrated image there are certain duties which continue to bind its former owner. When an image is consecrated there must be a provision made for its worship and upkeep and care should be taken to keep it unmolested by others. Similarly, in the case of the bull the उत्सर्गकर्ता will continue to be bound with the duty of protecting it and looking after its welfare.¹⁶ Since the उत्सर्गकर्ता has himself released the bull with a view to propitiate the manes of his departed relative and since the future movements of the bull in a free and unmolested condition are conducive to the conferment of the highest benefit on the ancestors of the उत्सर्गकर्ता, he is legally interested in seeing that the bull (now a juristic personality) roams freely over this earth during the remaining days of its life ; it is well protected and carefully looked after ; and no accident befalls it through chance or the wrong-doing of someone else¹⁷. As a result, it is clearly enjoined on everybody, that such a bull should not be yoked to a cart nor should it be used as a beast of burden ; neither for riding pur-

15. This is true of the Mahomedan system of jurisprudence as well. It is not necessary, according to Mahomedan law, that there should be a third person besides the owner to whom delivery of possession of the property should be made in order to constitute a valid wakf. If there is a valid declaration of the wakf the creator of the wakf himself becomes automatically the manager of the property on behalf of the Almighty.

16. He is required by the Shastras to feed the bull regularly and give shelter to it whenever necessary after the उत्सर्ग. And this is also the practice (see Romesh Chunder v. Hiru Mandal, ('93) 17 Cal 852).

17. विष्णुधर्मोत्तरम् :- यस्मिन् तडागे सजलं तृपार्तः । पातुं समागच्छति तप्तितृष्णाम् । दिव्यां तु पूर्णं सकलां महीपते । लोकेऽपरे तृप्तिमसौ विधत्ते ॥ सरिद्रां काञ्चिदधो पयाति । तृष्णान्वितस्तस्य पितामहानाम् । तृप्तिं विधत्ते सरिताम्बरिणि । उदीर्घकालं विविधाम्बुवाहा ॥ दर्पणपूर्णः सविषाण, धातैः । धरां यदा धारयते नरेन्द्र । पित्रादयस्तस्य तद्वक्रूटां, ध्रुवं लभन्तीति न संशयोऽत्र ॥

There are similar verses to be found in ब्रम्हपुराणं, कालिकापुराणम्, भविष्यपुराणं etc.

poses nor can it be tethered and so restrained;¹⁸ and the killing of, or causing any kind of harm to or putting to use such a bull is declared by the Hindu Jurists as an offence to be punished with severe punishment.¹⁹ And no damage can be recovered from their former owners, nor can they be punished for any injury either to person or property caused by such वृषोत्सर्ग bulls.²⁰

The above discussion will be useful in explaining the Hindu view of the वृषोत्सर्ग ceremony and the sacred character with which the वृषोत्सर्ग bulls are endowed. The Hindu community in general and the उत्सर्गकर्ता in particular do hold these bulls not only in extreme veneration but as sanctified objects fit to be worshipped, such as a consecrated idol in a temple. A parallel illustration will have convincing effect. The ceremony of नागबलि is required to be performed on the death of a person due to snake-bite. An image of नागराज or the snake deity is to be consecrated. The image will, ever after its consecration, be an object of worship not only for the person who installed it but for the Hindu community in general. वृषोत्सर्ग bulls are consecrated and released by Hindus on the death of their relatives; and they serve as objects of worship to Hindus in general. The existence of this fact ought to receive political recognition at the hands of the Government of the State and adequate provision in the law of the land should be made calculated to extend protection to these bulls and thus to prevent the wounding of the religious feelings of the Hindu community by their wanton destruction or by causing harm to them to the legal interests of their former owners and thus to prevent the bulls from being made the subject of theft, mischief and other similar offences, by wrong-doers. The existing provisions of the Penal Code in case of offences against religion appear to be inadequate for the inclu-

sion of offences against such bulls, while the provisions relating to offences against property are held to be not applicable to acts done in respect of these bulls.

Section 295, Penal Code provides against anyone who destroys, damages or defiles any place of worship or any object held sacred by any class of persons or with knowledge, etc. And looking to the explanation of the Law Commissioners stated in Note J, it would appear that the word "object" included in its meaning animate as well as inanimate objects.²¹ So it was held at least in two cases decided by the Lahore High Court.²² In the judgment of the former case Plowden J. says :

We consider that the word "object" as used in this section is not limited to inanimate objects, it is wide enough to include animate objects, which are held sacred, as well as, idols, relics or the like. The narrower construction will leave a very grave species of offences unprovided for, which the language employed, when literally construed, is wide enough to include.

In the latter case the same Judge stated that this Court had always held, in spite of the decisions of the other High Courts to the contrary, that the word "object" in S. 295, Penal Code included animate as well as inanimate objects.

The Allahabad High Court however had held in the year 1884 that a released bull ceases to be property.²³ The matter came up for decision in revision against conviction on the count of mischief, and Broadhurst J. held :

The bull had been branded and let loose; ownership over it then ceased; and at the time it was shot by the accused it was not the property of any person.

But this decision did not set the matter at rest and conviction under the offence of mischief and other offences went up again and again to the High Court in revision. The Magistrates who had a true and firsthand

21. Note J. "We have prescribed a punishment of great severity (the proposed punishment was rigorous imprisonment which may extend to 7 years) for the intentional destroying or defiling of places of worship or of objects held sacred by any class of persons. No offence in the whole Code is so likely to lead to tumult, to sanguinary outrage, and even to armed insurrection. The slaughter of a cow in a sacred place at Benares in 1809 caused violent tumult attended with considerable loss of life. The pollution of a mosque at Bangalore was attended with consequences still more lamentable and alarming. We have therefore empowered the Courts in cases of this description to pass very severe sentences on the offender."

22. ('84) 27 P R Cr 1884, Hakim v. Empress & ('88) 84 P R Cr 1888, Bahadur Singh v. Empress.

23. ('84) 1884 All W N 87, Queen-Empress v. Janmura.

18. निर्णयसिन्धु quotes an unknown author :—

विधारयेन्न न तं कश्चिन्नच कश्चन वाहयेत् । न दोहयेच्च तां धेनूः नच कश्चन बन्धयेत् ॥ ब्रम्हपुराणः— ना सौ वाह्यो न तत्क्षीरं पातव्यं केनचित् कचित् ॥

19. विवादरत्नाकर quotes the following verse as by मनुः— गोकुमारी देवपशुनुक्षणं वृषभं तथा । वाहयन साहसं पूर्वं प्राप्नुयादुत्तमं वधे ॥

20. मनुः— अनिर्देशाहां गां सूतां वृषां देव पशुस्तथा । सपालान्वा विपालान्वा न दण्ड्यान्मनुरब्रवीत् ॥

See याज्ञवल्क्य for similar verses in 2 - 225 - 6;

knowledge of the feelings of the Hindu community in this matter convicted the wrongdoers and these convictions were quashed by the High Court in the exercise of their revisional jurisdiction. The lower Judge was quite correct when he stated:²⁴

It was certainly not the intention of the persons who set the bull at large that any human right of property should be attached to it by any one, and the intentions of such persons are respected by general public feeling; and the bulls so let loose are looked upon as not liable to be converted to use in any way that would interfere with their liberty. I may be straining a point but I think it may be held that the Hindu public have such an interest in these "sands" remaining unmolested and at liberty, as to make them the subject of a sort of a public right, and so bring them within the meaning of "property." I find that the bull was for the purposes of S. 403, Penal Code, "property" and that it was dishonestly misappropriated... I affirm the conviction.

The discussion of the legal incidents arising on a वृषोत्सर्ग ceremony as made in this Note will make it clear that the Judge was not straining any point. The bull becomes a juristic person and both the Hindu public and the former owner do possess legal interest in its protection. But Straight J. observed in his judgment (in revision)

... an animal... was not the property at the time of the alleged misappropriation; for, it was not only not the subject of ownership by any person but the original owner had surrendered all his rights as its proprietor, and had given the beast its freedom to go whithersoever it chose. It was, therefore, a "*res nullius proprietatis*" and as incapable of larceny being committed in respect of it as if it had been a "*feræ naturæ*,"

and set aside the conviction. This decision was followed by the same Judge in a later case of a similar nature²⁵ and by the Calcutta High Court in 17 Cal 852.²⁶

It will be observed that the dictum of Straight J., in holding the released bull a "*feræ naturæ*," incapable of larceny being committed in respect of it, is incorrect in view of the above discussion. The bull does not become a "*res nullius proprietatis*;" certain powers (and therefore rights) continue to inhere in its former owner. Even if it is held that the animal was dedicated to the departed for the propitiation of the manes (which was the basis of the judgment of Plowden J., in 34 P R Cr. 1888²⁷) still according to Roman concepts (and hence according

to the English ideas of property) the bull would become a "*res sacre*" on its dedication; and as such a "*res nullus*" in the class of things styled "*res extra commercium*;" but it cannot certainly be classed as a "*feræ naturæ*."²⁸ It is apparent that Straight J., did not possess a clear notion of the वृषोत्सर्ग ceremony and the legal incident appertaining to it.

The question whether slaughter of वृषोत्सर्ग bulls can be a ground of conviction under s. 295, Penal Code, was raised in the Allahabad High Court for the first time in 10 ALL 150.²⁹ The Lahore High Court had already held that the word "object" used in s. 295 includes in its meaning animate as well as inanimate objects but there were grave doubts raised as to the correctness of this interpretation and the High Court appointed a full bench consisting of five Judges to set at rest the doubtful position. It was held by the Full Bench (Edge C. J., giving judgment) that the word "object" was used by the Legislature in the sense of a place of worship or a sense ejusdem generis, i. e., some inanimate object such as an idol, etc., and the Legislature did not intend that the term should apply to animate objects such as cows. This decision is followed in numerous other cases by other High Courts including the Lahore High Court which has now overruled its decision in 27 P R Cr 1884³⁰ by 10 P R Cr 1918.³¹ The Calcutta High Court has laid down the following propositions in 17 Cal 852.²⁶ (1) That the killing of the bull was not destroying within the meaning of s. 295, Penal Code. (2) That the bull was not an 'object' within the meaning of the same section. (3) That the bull was not "moveable property" within the meaning of ss. 378 and 403, Penal Code and could not therefore be subject of theft or of criminal misappropriation. (4) That the bull was not 'property' within the meaning of s. 425, Penal Code and therefore could not be subject of mischief.

The decision in this case has been held to be the final word of the law Courts about this vital matter. But these decisions have left the Hindu community unsatisfied.

28. For a more detailed discussion of the Roman concepts of the different classes of property the reader is recommended to read the elaborate judgment of Plowden J., in ('88) 34 P R Cr 1888.

29. ('88) 10 All 150 : 1888 A W N 17, Queen-Empress v. Imam Ali.

30. ('84) 27 P R Cr 1884, Hakim v. Empress.

31. ('18) 5 AIR 1918 Lah 365 : 44 I O 330 : 19 Cr L J 314 : 10 P R Cr 1918 : 160 P L R 1917 (FB), Ali Muhammad v. Emperor.

24. ('85) 8 All 51: 1885 A W N 326, Queen-Empress v. Bandhu.

25. ('87) 9 All 348 : 1887 A W N 73, Queen-Empress v. Nihal.

26. ('93) 17 Cal 852, Romesh Chunder v. Hiru Mundal.

27. ('88) 34 P R Cr 1888, Bahadur Singh v. Empress.

Even an eminent Hindu lawyer holding very advanced view has remarked that the provisions of S. 295 fall short of the requirements of the Hindu community as the narrow construction put upon the word "object" leaves an important class of offences unpunished.³² It cannot even be remotely suggested (and the writer does not entertain any such intention) that the eminent and learned Judges of more than one High Court consistently erred in a large number of successive cases in putting the stricter construction on the meaning of the word "object." The other parts of the definition of the offence may warrant such a conclusion. But Plowden J. in 27 P R Cr 1884,³⁰ appears to have looked at the question in a true perspective and therefore interpreted the term 'object' in a liberal manner which resulted in the protection of the important rights of the Hindu community about this vital matter. Even Mahamood J.,³³ sitting in the Full Bench realized the gravity of the lacunæ in the framework of S. 295 and went to the length of indirectly suggesting that the law should be amended in an appropriate manner.

About holding these वृषोत्सर्ग bulls mere "*feræ naturæ*" i. e., no-property and there-

32. Sir Harisingh Gour : The Indian Penal Code, Vol. I, see commentary on S. 295.

33. See Mahmood J.'s judgment in ('88) 10 All 150 at p. 156, etc.

fore not capable of being made a subject of theft and similar offences it can only be said that the true nature of the वृषोत्सर्ग ceremony was never brought to the notice of the learned British Judges. They sincerely believed that the released bull was turned into a "*feræ naturæ*" by the act of the उत्सर्गकर्ता, and Straight J. even points out that he satisfied himself of the exact nature and significance of the ceremony from the learned Government Pleader.³⁴ It is indeed remarkable that Plowden J. could have been able to appreciate in a more correct manner the nature of the ceremony and the legal incidents arising out of it. His judgment in 34 P R Cr 1888²⁷ (p. 74) is a masterpiece of scholarly thinking and of the comparative study of the different concepts of property and its ownership obtaining in different systems of jurisprudence. It was he who clearly pointed out the distinction between a "*res nullius*" and a "*feræ naturæ*" and that a thing which was a "*res nullius*" did not on that account mean ipso facto that it was a "*feræ naturæ*" also; he pointed out that a "*res sacrae*" or a "*res extra commercium*" also belonged to the class of "*res nullius*" but on that account were no more capable of being subjected to individual ownership.

34. ('85) 8 All 51 : 1885 A W N 926, Queen-Empress v. Bandhu, and ('87) 9 All 348 : 1887 A W N 73, Queen-Empress v. Nihal.

EFFECT OF DISMISSAL OF A SUIT ON AN ATTACHMENT BEFORE JUDGMENT IN THE SUIT

by V. RAMA SHENAI, Advocate, Ernakulam.

The question for consideration in this article is what is the fate of an attachment before judgment taken out in a suit when the suit is dismissed. The relevant provisions of the Civil Procedure Code touching the question are Rr. 9 and 11 of O. 38 corresponding to Ss. 488 and 490 of the Code of 1882. Rule 9 reads as follows :

When an order is made for attachment before judgment the Court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment or when the suit is dismissed.

A literal construction of the rule would suggest that a dismissal of the suit would not terminate the attachment before judgment unless an express order withdrawing the same is also passed. The result of the adoption of this view is to lay down the untenable proposition that an interim order or proceeding is kept alive even after the

main suit has been dismissed. But Rule 9 does not stand alone. Rule 11 enacts :

Where property is under attachment by virtue of the provision of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

The language of this rule while it dispenses with the necessity for a re-attachment of the property in execution in case a decree is passed in favour of the plaintiff, impliedly suggests that such a step would be inevitable where the main litigation terminated in the non-suit of the plaintiff. The combined effect of the two provisions seems to be, as pointed out, by Mahmood J. in 10 ALL 506¹ that the attachment before judgment does not survive the dismissal of the suit in spite of the omission of the

1. ('88) 10 All 506 : 1888 A W N 195, Ramchand v. Pitam Mal.

Court to pass an order withdrawing the same. Though in A I R 1924 Mad 494,² Wallace J. and in A I R 1928 Mad 940,³ Devadoss and Phillips JJ. of the Madras High Court had dissented from this view, the same however has commended itself to the learned Judges of the same High Court who had decided A I R 1928 Mad 976⁴ and 53 Mad 334.⁵ In the latter case, the views expressed by Devadoss and Phillips JJ. have been expressly dissented from. The current of decisions in Bombay, Calcutta and Rangoon is also in favour of the view expressed by Mahmood J.: *vide* 45 Cal 780,⁶ A I R 1925 Cal 1147,⁷ A I R 1928 Bom 545⁸ and A I R 1931 Rang 281.⁹ Thus at present, the consensus of judicial opinion in British India and Burma is that there is an automatic cesser of an attachment before judgment when the suit is dismissed even though no separate order removing or withdrawing the attachment has been passed. The same result would follow whether the suit is dismissed on the merits or for default, as the rule contemplates only a dismissal of the suit and not a non-suit after trial only. In A I R 1928 Cal 234,¹⁰ Page J. has held that an attachment before judgment which had ceased on the abatement of the suit under provisions of O. 22, Rr. 3 and 4 would not revive even if the abatement order is set aside.

Having ascertained the exact effect of the dismissal of the suit on the attachment before judgment, I shall now proceed to examine what happens when the dismissal of the suit is set aside. The dismissal may be set aside by the appellate or revisional Court or by the Court of first instance on review of judgment or when a suit dismissed for default is restored to file or when the

order of abatement is set aside by the trial Court or in pursuance of the orders of the appellate or revisional Court. The question naturally arises as to whether an attachment before judgment which had become defunct on the dismissal of the suit ipso facto revives on the dismissal being reversed in appeal, revision or on review or on the subsequent restoration of the suit. Unhampered by authority and on first principles the answer to the question seems to be an emphatic *No*. There is no machinery provided in the Code for such a resuscitation. Order 38, R. 9 contains no provision corresponding to O. 21, R. 63 which makes the order in a claim case and the raising of the attachment thereupon subject to the result of an original suit filed for vacating the claim order. There is a consensus of judicial opinion that a reversal of dismissal by the appellate Court does not revive the attachment before judgment. On principle, a different view does not seem to be eligible when the dismissal is set aside in revision or on review or on the subsequent restoration of the suit which had been dismissed for default or when the order of abatement is set aside.

While the Rangoon High Court has held in A I R 1931 Rang 281⁹ that the restoration of a suit dismissed for default does not revive an attachment before judgment which had terminated with the dismissal of the suit, the High Court of Cochin in 30 Cochin Law Reports 510¹¹ has taken the opposite view. The view of the Rangoon High Court seems to be more sound on the statutory provisions and on principle and is also in consonance with the view of the Calcutta High Court in 13 C L J 243.¹² Mookerji J. delivering the judgment of the Court observes at p. 248 of 13 C L J :

As pointed out in the classical treatise on the Law of Attachment by Drake C. J. (Ss. 228, 413 and 428) although there has been some divergence of judicial opinion the preponderance of decisions is in favour of the view that the reversal of the judgment in favour of the defendant does not by itself revive the attachment. It has been ruled that a judgment in favour of the defendant whether for default of the plaintiff or upon the merits, dissolves the attachment, and the subsequent reversal of the judgment does not restore the uninterrupted operation of the attachment.

Walsh J. in the decision of the Madras High Court in 126 I C 614⁵ is also inclined

2. ('24) 11 A I R 1924 Mad 494 : 83 I C 91 : 47 Mad 489 : 46 M L J 415 (FB), Meyyappa Chettiar v. Chidambaram Chettiar.

3. ('28) 15 A I R 1928 Mad 940 : 111 I C 887 : 56 M L J 70, Namagiri Ammal v. Muthu Vellappa Goundan.

4. ('28) 15 A I R 1928 Mad 976 : 113 I C 63, Seethai Ammal v. Narayana Iyengar.

5. ('30) 17 A I R 1930 Mad 514 : 126 I C 614 : 53 Mad 334 : 58 M L J 675 (FB), Balaraju Chettiar v. Masilamani Pillai.

6. ('18) 5 A I R 1918 Cal 39 : 44 I C 229 : 45 Cal 780 : 22 C W N 927, Abdul Rahman v. Amir Sharif.

7. ('25) 12 A I R 1925 Cal 1147 : 87 I C 756, Chundra Datta v. Joy Chandra.

8. ('28) 15 A I R 1928 Bom 545 : 115 I C 414 : 30 Bom L R 1488, Chindha Rupla v. Chagan Lal.

9. ('31) 18 A I R 1931 Rang 281 : 134 I C 748 : 9 Rang 472, Pindi v. U Tha Ma.

10. ('28) 15 A I R 1928 Cal 234 : 109 I C 164 : 47 C L J 282, Jyotish Chandra v. Harchandra.

11. 30 Cochin Law Reports 510, Gopalakrishnan Embrandiri v. Padmanabhan Unni.

12. ('11) 13 C L J 243 : 9 I C 918, Sasirama Kumari v. Meherban Khan.

Even an eminent Hindu lawyer holding very advanced view has remarked that the provisions of S. 295 fall short of the requirements of the Hindu community as the narrow construction put upon the word "object" leaves an important class of offences unpunished.³² It cannot even be remotely suggested (and the writer does not entertain any such intention) that the eminent and learned Judges of more than one High Court consistently erred in a large number of successive cases in putting the stricter construction on the meaning of the word "object." The other parts of the definition of the offence may warrant such a conclusion. But Plowden J. in 27 P R Cr 1884,³⁰ appears to have looked at the question in a true perspective and therefore interpreted the term 'object' in a liberal manner which resulted in the protection of the important rights of the Hindu community about this vital matter. Even Mahamood J.,³³ sitting in the Full Bench realized the gravity of the lacunæ in the framework of S. 295 and went to the length of indirectly suggesting that the law should be amended in an appropriate manner.

About holding these वृषोत्सर्ग bulls mere "*feræ naturæ*" i. e., no-property and there-

fore not capable of being made a subject of theft and similar offences it can only be said that the true nature of the वृषोत्सर्ग ceremony was never brought to the notice of the learned British Judges. They sincerely believed that the released bull was turned into a "*feræ naturæ*" by the act of the उत्सर्गकर्ता, and Straight J. even points out that he satisfied himself of the exact nature and significance of the ceremony from the learned Government Pleader.³⁴ It is indeed remarkable that Plowden J. could have been able to appreciate in a more correct manner the nature of the ceremony and the legal incidents arising out of it. His judgment in 34 P R Cr 1888³⁷ (p. 74) is a masterpiece of scholarly thinking and of the comparative study of the different concepts of property and its ownership obtaining in different systems of jurisprudence. It was he who clearly pointed out the distinction between a "*res nullius*" and a "*feræ naturæ*" and that a thing which was a "*res nullius*" did not on that account mean ipso facto that it was a "*feræ naturæ*" also; he pointed out that a "*res sacrae*" or a "*res extra commercium*" also belonged to the class of "*res nullius*" but on that account were no more capable of being subjected to individual ownership.

32. Sir Harisingh Gour : The Indian Penal Code, Vol. I, see commentary on S. 295.

33. See Mahmood J.'s judgment in ('88) 10 All 150 at p. 156, etc.

34. ('85) 8 All 51 : 1885 A W N 326, Queen-Empress v. Bandhu, and ('87) 9 All 348 : 1887 A W N 73, Queen-Empress v. Nihal.

EFFECT OF DISMISSAL OF A SUIT ON AN ATTACHMENT BEFORE JUDGMENT IN THE SUIT

by V. RAMA SHENAI, Advocate, Ernakulam.

The question for consideration in this article is what is the fate of an attachment before judgment taken out in a suit when the suit is dismissed. The relevant provisions of the Civil Procedure Code touching the question are Rr. 9 and 11 of O. 38 corresponding to Ss. 488 and 490 of the Code of 1882. Rule 9 reads as follows :

When an order is made for attachment before judgment the Court shall order the attachment to be withdrawn when the defendant furnishes the security required together with security for the costs of the attachment or when the suit is dismissed.

A literal construction of the rule would suggest that a dismissal of the suit would not terminate the attachment before judgment unless an express order withdrawing the same is also passed. The result of the adoption of this view is to lay down the untenable proposition that an interim order or proceeding is kept alive even after the

main suit has been dismissed. But Rule 9 does not stand alone. Rule 11 enacts :

Where property is under attachment by virtue of the provision of this order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property.

The language of this rule while it dispenses with the necessity for a re-attachment of the property in execution in case a decree is passed in favour of the plaintiff, impliedly suggests that such a step would be inevitable where the main litigation terminated in the non-suit of the plaintiff. The combined effect of the two provisions seems to be, as pointed out, by Mahmood J. in 10 ALL 506¹ that the attachment before judgment does not survive the dismissal of the suit in spite of the omission of the

1. ('89) 10 All 506 : 1888 A W N 195, Ramchand v. Pitam Mal.

Court to pass an order withdrawing the same. Though in A I R 1924 Mad 494,² Wallace J. and in A I R 1928 Mad 940,³ Devadoss and Phillips JJ. of the Madras High Court had dissented from this view, the same however has commended itself to the learned Judges of the same High Court who had decided A I R 1928 Mad 976⁴ and 53 Mad 334.⁵ In the latter case, the views expressed by Devadoss and Phillips JJ. have been expressly dissented from. The current of decisions in Bombay, Calcutta and Rangoon is also in favour of the view expressed by Mahmood J.: *vide* 45 Cal 780,⁶ A I R 1925 Cal 1147,⁷ A I R 1928 Bom 545⁸ and A I R 1931 Rang 281.⁹ Thus at present, the consensus of judicial opinion in British India and Burma is that there is an automatic cesser of an attachment before judgment when the suit is dismissed even though no separate order removing or withdrawing the attachment has been passed. The same result would follow whether the suit is dismissed on the merits or for default, as the rule contemplates only a dismissal of the suit and not a non-suit after trial only. In A I R 1928 Cal 234,¹⁰ Page J. has held that an attachment before judgment which had ceased on the abatement of the suit under provisions of O. 22, Rr. 3 and 4 would not revive even if the abatement order is set aside.

Having ascertained the exact effect of the dismissal of the suit on the attachment before judgment, I shall now proceed to examine what happens when the dismissal of the suit is set aside. The dismissal may be set aside by the appellate or revisional Court or by the Court of first instance on review of judgment or when a suit dismissed for default is restored to file or when the

order of abatement is set aside by the trial Court or in pursuance of the orders of the appellate or revisional Court. The question naturally arises as to whether an attachment before judgment which had become defunct on the dismissal of the suit ipso facto revives on the dismissal being reversed in appeal, revision or on review or on the subsequent restoration of the suit. Unhampered by authority and on first principles the answer to the question seems to be an emphatic *No*. There is no machinery provided in the Code for such a resuscitation. Order 38, R. 9 contains no provision corresponding to O. 21, R. 63 which makes the order in a claim case and the raising of the attachment thereupon subject to the result of an original suit filed for vacating the claim order. There is a consensus of judicial opinion that a reversal of dismissal by the appellate Court does not revive the attachment before judgment. On principle, a different view does not seem to be eligible when the dismissal is set aside in revision or on review or on the subsequent restoration of the suit which had been dismissed for default or when the order of abatement is set aside.

While the Rangoon High Court has held in A I R 1931 Rang 281⁹ that the restoration of a suit dismissed for default does not revive an attachment before judgment which had terminated with the dismissal of the suit, the High Court of Cochin in 30 Cochin Law Reports 510¹¹ has taken the opposite view. The view of the Rangoon High Court seems to be more sound on the statutory provisions and on principle and is also in consonance with the view of the Calcutta High Court in 13 C L J 243.¹² Mookerji J. delivering the judgment of the Court observes at p. 248 of 13 C L J :

As pointed out in the classical treatise on the Law of Attachment by Drake C. J. (Ss. 228, 413 and 428) although there has been some divergence of judicial opinion the preponderance of decisions is in favour of the view that the reversal of the judgment in favour of the defendant does not by itself revive the attachment. It has been ruled that a judgment in favour of the defendant whether for default of the plaintiff or upon the merits, dissolves the attachment, and the subsequent reversal of the judgment does not restore the uninterrupted operation of the attachment.

Walsh J. in the decision of the Madras High Court in 126 I C 614⁵ is also inclined

2. ('24) 11 A I R 1924 Mad 494 : 83 I C 91 : 47 Mad 483 : 46 M L J 415 (FB), Meyyappa Chettiar v. Chidambaram Chettiar.

3. ('28) 15 A I R 1928 Mad 940 : 111 I C 887 : 56 M L J 70, Namagiri Ammal v. Muthu Vellappa Goundan.

4. ('28) 15 A I R 1928 Mad 976 : 113 I C 63, Seethai Ammal v. Narayana Iyengar.

5. ('30) 17 A I R 1930 Mad 514 : 126 I C 614 : 53 Mad 334 : 58 M L J 675 (FB), Balaraju Chettiar v. Masilamani Pillai.

6. ('18) 5 A I R 1918 Cal 39 : 44 I C 229 : 45 Cal 780 : 22 C W N 927, Abdul Rahman v. Amir Sharif.

7. ('25) 12 A I R 1925 Cal 1147 : 87 I C 756, Chundra Datta v. Joy Chandra.

8. ('28) 15 A I R 1928 Bom 545 : 115 I C 414 : 30 Bom L R 1488, Chindha Rupla v. Chagan Lal.

9. ('31) 18 A I R 1931 Rang 281 : 134 I C 748 : 9 Rang 472, Pindi v. U Tha Ma.

10. ('28) 15 A I R 1928 Cal 234 : 109 I C 164 : 47 C L J 282, Jyotish Chandra v. Harchandra.

11. 30 Cochin Law Reports 510, Gopalakrishnan Embrandiri v. Padmanabhan Unni.

12. ('11) 13 C L J 243 : 9 I C 918, Sasirama Kumari v. Meherban Khan.

in favour of the above view. At p. 619 the learned Judge observes :

As regards the argument that in the case of a suit dismissed for default and restored in the course of the same day it would work hardship to hold that the attachment ceased to have force, it is difficult to see how that can be a hardship which the law commands.

The learned Judges of the High Court of Cochin rest their decision on the broad principle that the restoration of the suit dismissed for default puts the parties in *loco quo ante* and revives not only the suit but also all interlocutory proceedings and orders including orders of attachment before judgment. In support of the above proposition they rely upon the decision of the Madras High Court in 58 Mad 721.¹³ No doubt there are observations in the said decision which lend support to the proposition enunciated by the learned Judges. Beasley C. J. observes at pp. 724 to 725 of 58 Madras :

In a later case, namely 65 M L J 844,¹⁴ our learned brother Ramesam J., sitting alone held that in the case of a suit dismissed for default and soon afterwards restored to file, in the absence of anything expressly appearing against the view that interlocutory applications were restored, the suit and all incidental matters were restored to file. In that case, our learned brother correctly takes the view that 58 Mad 834¹⁵ upon which the District Munsif relied, does not govern the present case and that the question is not whether the ancillary orders fall with the suit when it is dismissed but whether when the suit is restored they are also restored. I entirely agree with our learned brother's view upon this question. It does not seem to me reasonable that the plaintiff in a suit who has got an attachment before judgment should have again, after the restoration of the suit after its dismissal for default, to apply to the Court for a fresh attachment and that he having done so the defendant should have to apply to raise the attachment by producing a surety or sureties. The commonsense view of the matter is that all ancillary orders should be restored on the restoration of the suit without any further orders.

But it is submitted, with great respect, that the observations of the Chief Justice of the Madras High Court in 58 Mad 721¹³ are to be confined to the facts of that particular case and not to be pressed into service for laying down the broad proposition of law laid down by the learned Judges of the High Court of Cochin. The question debated in 58 Mad 721¹³ is whether a surety for raising an attachment before judgment taken out in the suit is not liable to answer the final decree passed by the trial Court in

favour of the plaintiff merely because the suit happened to be dismissed for default at one stage of the proceedings after attachment before judgment was raised on the defendant furnishing the necessary security. As a decision on the question of the liability of the surety for raising an attachment before judgment, the decision in 58 Mad 721¹³ lays down sound law; but its authority, as has already been suggested, should be confined to the point actually decided by it and not to be extended to everything that may seem to follow from the observations therein. In (1901) A C 495¹⁶ at p. 506 the Earl of Halsbury L. C. delivered himself of this weighty pronouncement :

There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found.

The point mooted before the High Court of Cochin did not at all arise for decision in 58 Mad 721.¹³ The liability of a surety depends mainly upon the terms of the security bond and in cases of ambiguity upon the provisions of law under which the bond is taken. The confusion arises in assuming that the provisions of O. 38, R. 9 are controlled by the provisions of O. 38, R. 5 and vice versa. To say that the restoration of a suit dismissed for default, per se restores all interlocutory proceedings and orders appears to be going too far and might lead to startling results and serious difficulties.

The illustrations given below will demonstrate the startling results to which the above proposition of law might lead us. Take a case in which the immovable properties of the defendant have been attached before judgment. If the suit is dismissed for default and before the suit is, on application, restored to file, the defendant transfers the attached property, does the transferee get the property subject to claims enforceable under the attachment or does he get it free of such claims? If the broad proposition of law laid down in 30 Cochin is to govern the case, the answer to the above question should be that the transferee gets a title to the property only subject to claims enforceable under the attachment.

13. (85) 22 A I R 1985 Mad 865: 157 I O 528: 58 Mad 721: 68 M L J 444 (F B), Veeraswami v. Ramanna.

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Again for instance, in a passing off action a defendant might be restrained by a temporary injunction from manufacturing and selling certain goods during the pendency of the suit. If the suit is dismissed for default and subsequently restored to file, would the defendant be liable to be proceeded against for disobedience of injunction or for contempt of Court if he had continued to manufacture and sell the goods in the period between the dismissal of the suit for

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default and the subsequent restoration of the suit? If the principle of the automatic revival of interim proceedings with retrospective effect is to prevail, Courts would have the power to punish a defendant for breach of an injunction which had died with the dismissal of a suit. The learned Judges of the High Court of Cochin are not seem to have been addressed on this aspect of the matter. In my humble view, the decision in 30 Cochin 510 requires reconsideration and it is hoped that the learned Judges will not hesitate to reconsider the question when a proper occasion arises. It is also hoped that the learned Judges of the Madras High Court will elucidate upon the exact scope and limits of the decision and the general observations in 58 Mad 721¹³ at the earliest opportunity.

To summarise, on principle and authority, an attachment before judgment taken out in a suit automatically comes to an end with the dismissal of the suit either for default or on the merits and does not automatically revive with the reversal of the judgment of dismissal on review or on appeal or in revision or on the subsequent restoration of the suit. Any other view will only lead to anomalies and unthought-of difficulties which it is not the intention of the Legislature or the judiciary to create.

REVIEW

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THE ALL INDIA REPORTER

1941

IMPERIAL ACTS SECTION

CONTAINING

ACTS OF THE INDIAN LEGISLATURE ASSENTED
BY THE GOVERNOR-GENERAL



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INDEX TO IMPERIAL ACTS

Assam Rifles Act (5 of 1941) ...	28	Motor Spirit (Duties) Amendment Act (39 of 1940) ...	12
Berar Laws Act (4 of 1941) ...	25	Navy (Discipline) Amendment Act (29 of 1940) ...	1
Cantonments (Amendment) Act (31 of 1940)...	2	Navy (Discipline) Second Amendment Act (30 of 1940) ...	2
Code of Civil Procedure (Amendment) Act (34 of 1940) ...	8	Petroleum (Amendment) Act (3 of 1941) ...	25
Code of Criminal Procedure (Amendment) Act (35 of 1940) ...	8	Protective Duties Continuation Act (8 of 1941)	36
Companies (Amendment) Act (36 of 1940) ...	9	Railways (Amendment) Act (6 of 1941) ...	32
Delhi Restrictions of Uses of Land Act (12 of 1941) ...	39	Registration (Amendment) Act (33 of 1940) ...	7
Excess Profits Tax (Amendment) Act (42 of 1940) ...	16	Repealing and Amending Act (32 of 1940) ...	3
Excess Profits Tax (Amendment) Act (11 of 1941) ...	38	Reserve Bank of India (Third Amendment) Act (38 of 1940) ...	11
Finance Act (7 of 1941) ...	33	Sale of Goods (Amendment) Act (41 of 1940)	15
Income-tax (Amendment) Act (40 of 1940) ...	12	Tariff (Amendment) Act (9 of 1941) ...	36
Insurance (Amendment) Act (13 of 1941) ...	43	Tyres (Excise Duty) Act (10 of 1941) ...	36
Insurance Deposits (Temporary Reduction) Act (1 of 1941)...	19	War Donations and Investments (Companies) Act (37 of 1940) ...	10
Merchandise Marks (Amendment) Act (2 of 1941) ...	21	Works of Defence (Amendment) Act (28 of 1940) ...	1

CHRONOLOGICAL LIST OF ACTS

XXVIII of 1940 — Indian Works of Defence (Amendment) Act ...	1	XLI of 1940 — Indian Sale of Goods (Amendment) Act ...	15
XXIX of 1940 — Indian Navy (Discipline) Amendment Act ...	1	XLII of 1940 — Excess Profits Tax (Amendment) Act ...	16
XXX of 1940 — Indian Navy (Discipline) Second Amendment Act ...	2	I of 1941 — Insurance Deposits (Temporary Reduction) Act ...	19
XXXI of 1940 — Cantonments (Amendment) Act ...	2	II of 1941 — Indian Merchandise Marks (Amendment) Act ...	21
XXXII of 1940 — Repealing and Amending Act ...	3	III of 1941—Petroleum (Amendment) Act ...	25
XXXIII of 1940—Indian Registration (Amendment) Act ...	7	IV of 1941—Berar Laws Act ...	25
XXXIV of 1940 — Code of Civil Procedure (Amendment) Act ...	8	V of 1941—Assam Rifles Act ...	28
XXXV of 1940 — Code of Criminal Procedure (Amendment) Act ...	8	VI of 1941 — Indian Railways (Amendment) Act ...	32
XXXVI of 1940—Indian Companies (Amendment) Act ...	9	VII of 1941—Indian Finance Act ...	33
XXXVII of 1940 — War Donations and Investments (Companies) Act ...	10	VIII of 1941 — Protective Duties Continuation Act ...	36
XXXVIII of 1940 — Reserve Bank of India (Third Amendment) Act ...	11	IX of 1941—Indian Tariff (Amendment) Act ...	36
XXXIX of 1940 — Motor Spirit (Duties) Amendment Act ...	12	X of 1941—Tyres (Excise Duty) Act ...	36
XL of 1940 — Indian Income-tax (Amendment) Act ...	12	XI of 1941—Excess Profits Tax (Amendment) Act ...	38
		XII of 1941 — Delhi Restrictions of Uses of Land Act ...	39
		XIII of 1941—Insurance (Amendment) Act ...	43

THE ALL INDIA REPORTER 1941 IMPERIAL ACTS SECTION

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ACT No. XXVIII OF 1940.

The Indian Works of Defence (Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Indian Works of Defence Act, 1903.

WHEREAS it is expedient further to amend the Indian Works of Defence Act, 7 of 1903, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Works of Defence (Amendment) Act, 1940.

Amendment of section 7, Act VII of 1903. 2. In section 7 of the Indian Works of Defence Act, 1903,—

(a) in sub-clause (i) of clause (b), for the words preceding the first proviso the following words shall be substituted, namely :—

"no building, wall, bank or other construction of permanent materials above the ground shall be maintained otherwise than

with the written approval of the General Officer Commanding the District and on such conditions as he may prescribe, and no such building, wall, bank or other construction shall be erected: " ;

(b) in the proviso to clause (c), after the word "prescribe" the following words shall be inserted, namely :—
"a building or other construction on the surface may be maintained and"

Notes. — The object of the amendment is to modify the restrictions which attached by virtue of S. 7 of the Act to land in vicinity of the work of defence in consequence of the publication of the notice mentioned in S. 3 (2) of the Act, so as to make it possible to exempt from demolition specified buildings existing at the time of the issue of the notice and permit those buildings to be maintained in the same condition.

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ACT No. XXIX OF 1940.

The Indian Navy (Discipline) Amendment Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Indian Navy (Discipline) Act, 1934, for certain purposes.

WHEREAS it is expedient further to amend the Indian Navy (Discipline) Act, 1934, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Navy (Discipline) Amendment Act, 1940.

Amendment of First Schedule to Act XXXIV of 1934. 2. In the Naval Discipline Act as set out in the First Schedule to

the Indian Navy (Discipline) Act, 1934,—

(a) to the first paragraph of section 45 the following shall be added, namely :—

"or, except in the case of an offence punishable under the said section 302 or 377, with such other punishment as is hereinafter mentioned";

and

(b) in section 55, for the words "corporal punishment shall be deemed equal in degree

to imprisonment, and" the following shall be substituted, namely :—

"transportation shall be deemed equal in degree to penal servitude, and corporal

punishment shall be deemed equal in degree to imprisonment and".

Notes. — The amendment of S. 45 now makes legal the imposition of minor punishments according to the customs of the Navy.

ACT NO. XXX OF 1940.

The Indian Navy (Discipline) Second Amendment Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Indian Navy (Discipline) Act, 1934.

WHEREAS it is expedient further to amend the Indian Navy (Discipline) Act, 1934, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Indian Navy (Discipline) Second Amendment Act, 1940.

2. In sub-section (1) of section 90C of the

Naval Discipline Act as set forth in the *Amendment of First Schedule to the First Schedule, Act Indian Navy (Discipline) Act, 1934, after the words "self-governing Dominion", wherever they occur, the words "or Burma" shall be inserted.*

Notes. — The amendment provides for the discipline of the Indian Naval Forces when serving with the Naval Forces of Burma.

ACT NO. XXXI OF 1940.

The Cantonments (Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Cantonments Act, 1924.

WHEREAS it is expedient further to amend the Cantonments Act, 1924, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Cantonments (Amendment) Act, 1940.

2. For clause (i) of sub-section (2) of *Amendment of section 27, Act II of 1924.* section 27 of the Cantonments Act, 1924 (hereinafter referred to as the said Act), the following clause shall be substituted, namely :—

"(i) is not either a British subject or a subject of an Indian State, or".

3. In section 32 of the said Act, after the *Amendment of section 32, Act II of 1924.* words, "meeting of the Board" the words "or of any committee of the Board" shall be inserted.

Amendment of section 34, Act II of 1924. 4. In section 34 of the said Act,—

(a) in clause (a) of sub-section (1), for the words brackets and figures "or in sub-section (2) of section 28" the words and figures "or in section 28" shall be substituted;

(b) after sub-section (2) the following sub-section shall be inserted, namely :—

"(2A) The Central Government may, on receipt of a report from the Officer Commanding the station, through the Officer Commanding-in-Chief, the Command, remove from a Board any military Officer nominated a member of the Board who is, in the opinion of the Officer Commanding the station, unable to discharge his duties as member of the Board and has failed to resign his office."

Notes. — The sub-s. (2A) removes a frequent source of embarrassment by providing power to remove a nominated official member who has ceased to serve in the cantonment and has left without tendering his resignation for an inaccessible destination.

5. In sub-section (1) of section 35 of the *Amendment of said Act, after the word, section 35, Act II of 1924.* brackets and figure "sub-section (1)" the words, brackets, figure and letter "or under sub-section (2A)" shall be inserted.

6. In clause (b) of section 186 of the said *Amendment of Act, for the words "in section 186, Act II of 1924.* any specified area or areas" the words "in

the cantonment or any part thereof" shall be substituted.

Notes. — The object of amending S. 186 is to bring the wording of clause (b) of the section into line with that of clause (d) with a view to removing the doubt arising as to the adequacy of the language used in clause (b) to cover a prescription applicable to the cantonment as a whole.

7. In section 188 of the said Act, for the *Amendment of* word "building" the *section 188, Act II* word "structure" shall *of 1924.* be substituted.

8. In schedule V to the said Act, the *Amendment of* entry relating to sec- *schedule V Act II* tion 137 shall be omit- *of 1924.* ted.

ACT No. XXXII OF 1940.

The Repealing and Amending Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act to repeal certain enactments and to amend certain other enactments.

WHEREAS it is expedient that the enactments specified in the First Schedule, which are spent or have otherwise become unnecessary, or have ceased to be in force otherwise than by expressed specific repeal, should be expressly and specifically repealed;

AND WHEREAS it is expedient that certain amendments should be made in the enactments specified in the Second Schedule;

It is hereby enacted as follows:—

1. This Act may be called the Repealing *Short title.* and Amending Act, 1940.

Notes:—The object of the Repealing and Amending Act is to remove from the Statute book certain Acts or portions of Acts which have either ceased to have effect or ceased to be in force and to correct small errors detected in the Acts included in the Second Schedule.

2. The enactments specified in the First *Repeal of certain* Schedule are hereby *enactments.* repealed to the extent mentioned in the fourth column thereof.

3. The enactments specified in the Second *Amendment of* Schedule are hereby *certain enactments.* amended to the extent and in the manner mentioned in the fourth column thereof.

4. The repeal by this Act of any enactment shall not affect any Act or Regulation

in which such enactment has been applied, incorporated or referred to;

and this Act shall not affect the validity, invalidity, effect or consequences of anything already done or suffered or any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof, or any release or discharge of or from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing;

nor shall this Act affect any principle or rule of law, or established jurisdiction, form or course of pleading, practice or procedure, or existing usage, custom, privilege, restriction, exemption, office or appointment, notwithstanding that the same respectively may have been in any manner affirmed, recognized or derived by, in or from any enactment hereby repealed;

nor shall the repeal by this Act of any enactment revive or restore any jurisdiction, office, custom, liability, right, title, privilege, restriction, exemption, usage, practice, procedure or other matter or thing not now existing or in force.

THE FIRST SCHEDULE.

REPEALS.

(See section 2.)

Year.	No.	Short title.	Extent of repeal.
1	2	3	4
<i>Acts of the Governor-General in Council.</i>			
1836	XX	The Batwaras Act, 1836.	The whole in any areas where not already specifically repealed.
1837	XXVII	The Bombay Salt Works Act, 1837.	The whole in any areas where not already specifically repealed.
1838	XI	The Bengal Ameen's Act, 1838.	The whole in any areas where not already specifically repealed.
1838	XVIII	The Bombay Sureties Act, 1838.	The whole.
1848	XVIII	The Nawab of Surat Act, 1848.	The whole in any areas where not already specifically repealed.
1858	XXXVII	The Nawab of Carnatic Act, 1858.	The whole.
1859	XIV	The Summary Dispossession Act, 1859.	The whole in any areas where not already specifically repealed.
1868	XIII	The King of Oudh's Act, 1868.	The whole.
1873	XVII	The Nawab Nazim's Debts Act, 1873.	The whole.
1895	XX	Ex-King Thebaw's Act, 1895.	The whole.
<i>Acts of the Indian Legislature.</i>			
1931	I	The Punjab Criminal Procedure Amendment (Supplementary) Act, 1931.	The whole.
1931	XIV	The Salt (Additional Import Duty) Act, 1931.	The whole.
1933	XXIV	The Indian Tea Control Act, 1933.	The whole.
1933	XVII	The Indian Wireless Telegraphy Act, 1933.	Section 9 and in section 10 (2) the word "and" at the end of clause (v) and the whole of clause (vi).
1936	II	The Salt Additional Import Duty (Extending) Act, 1936.	The whole.
1936	VI	The Cochin Port Act, 1936.	The whole.
1936	VII	The Indian Aircraft (Amendment) Act, 1936.	The whole.
1936	VIII	The Factories (Amendment) Act, 1936.	The whole.
1936	IX	The Indian Lac Cess (Amendment) Act, 1936.	The whole.
1936	X	The Indian Tariff (Amendment) Act, 1936.	The whole.
1936	XI	The Indian Mines (Amendment) Act, 1936.	The whole.
1936	XII	The Indian Tariff (Second Amendment) Act, 1936.	The whole.
1936	XIII	The Indian Tea Cess (Amendment) Act, 1936.	The whole.

Year.	No.	Short title.	Extent of repeal.
1	2	3	4

Acts of the Indian Legislature — contd.

1936	XV	The Indian Rubber Control (Amendment) Act, 1936.	The whole.
1936	XVII	The Indian Tea Control (Amendment) Act, 1936.	The whole.
1936	XIX	The General Clauses (Amendment) Act, 1936.	The whole.
1936	XX	The Chittagong Port (Amendment) Act, 1936.	The whole.
1936	XXI	The Code of Civil Procedure (Amendment) Act, 1936.	The whole.
1936	XXIV	The Cantonments (Amendment) Act, 1936.	The whole.

Act of the Governor-General.

1936	---	The Indian Finance Act, 1936.	In the long title and preamble, the words and figures "to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to fix maximum rates of postage under the Indian Post Office Act, 1898, and". Sections 2 and 3 and Schedule I.
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Act of the Governor of Bombay in Council.

1867	VI	The Bombay City Sanitary Regulation Act, 1867.	So much of the Act as relates to any matter included in the Federal Legislative List.
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Regulations made by the Governor General in Council.

1936	VIII	The Andaman and Nicobar Islands Land-tenure (Amendment) Regulation, 1936.	The whole.
1936	IX	The Sind Laws (Amendment) Regulation, 1936.	The whole.
1936	X	The Sind Laws (Second Amendment) Regulation, 1936.	The whole.
1936	XI	The Orissa Laws (Amendment) Regulation, 1936.	The whole.
1936	XV	The British Baluchistan Laws (Amendment) Regulation, 1936.	The whole.

THE SECOND SCHEDULE.

AMENDMENTS.

(See section 3.)

Year.	No.	Short title.	Amendments.
1	2	3	4
<i>Acts of the Governor-General in Council.</i>			
1897	X	The General Clauses Act, 1897.	For clause (27b) of section 3 the following clause shall be substituted, namely:— “(27b) ‘Indian State’ shall mean any territory, not being part of British India, which His Majesty recognises as being such a State whether described as a State, an Estate, a Jagir or otherwise;”.
1908	XVI	Indian Registration Act, 1908.	In section 29 (1), for the words and figures “other than a document referred to in section 28, and a copy of a decree or order” the words and figures “not being a document referred to in section 28 or a copy of a decree or order” shall be substituted.
1910	IX	The Indian Electricity Act, 1910.	In section 52 the word “Indian” shall be omitted.
1913	III	The Administrator General's Act, 1913.	In section 33, for the word “presidency” the word “division” shall be substituted.
1913	VII	The Indian Companies Act, 1913.	In sub-sections (1) and (3) of section 152 the word “Indian” shall be omitted. In sub-section (6) of section 208C, for the words and figures “Indian Arbitration Act, 1899” the words and figures “Arbitration Act, 1940” shall be substituted.
<i>Acts of the Indian Legislature.</i>			
1922	VIII	The Delhi University Act, 1922.	In sub-section (2) of section 46, for the figures “1897” the figures “1925” shall be substituted.
1923	VI	The Cantonments (House-Accommodation) Act, 1923.	In sub-section (3) of section 36, for the word “Authority” the word “Board” shall be substituted.
1923	XIV	The Indian Cotton Cess Act, 1923.	In clause (1a) of section 4 the words “in agricultural matters” shall be omitted.
1924	II	The Cantonments Act, 1924.	In sub-section (5) of section 73, for the words “every transfer on devolution” the words “every transfer or devolution” shall be substituted. In clause (a) of sub-section (2) of section 254, for the words “on any one of them” the words “to any one of them” shall be substituted.
1937	VI	The Arbitration (Protocol and Convention) Act, 1937.	In section 3 for the words and figures “Indian Arbitration Act, 1899” the words and figures “Arbitration Act, 1940” shall be substituted.

Year	No.	Short title.	Amendments.
1	2	3	4

Acts of the Central Legislature.

1937	XVIII	The Hindu Women's Rights to Property Act, 1937.	In sub-section (2) of section 1, the words "including British Baluchistan and the Sonthal Parganas but excluding Burma" shall be omitted.
1937	XIX	The Arya Marriage Validation Act, 1937.	In sub-section (2) of section 1, the words "including British Baluchistan and the Sonthal Parganas" shall be omitted.

Regulation made by the Governor-General in Council.

1913	II	The British Baluchistan Laws Regulation, 1913.	In Schedule I, for the item — <div style="display: flex; align-items: center;"> <div style="border-right: 1px solid black; padding: 0 5px;">"1934</div> <div style="border-right: 1px solid black; padding: 0 5px;">XXXIV</div> <div style="border-right: 1px solid black; padding: 0 5px;">The Indian Tariff Act, 1932.</div> <div style="padding: 0 5px;">Section 5 only."</div> </div> <p>the following item shall be substituted, namely:—</p> <div style="display: flex; align-items: center;"> <div style="border-right: 1px solid black; padding: 0 5px;">"1934</div> <div style="border-right: 1px solid black; padding: 0 5px;">XXXII</div> <div style="border-right: 1px solid black; padding: 0 5px;">The Indian Tariff Act, 1934.</div> <div style="padding: 0 5px;">Section 5 only."</div> </div>
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Regulation made by the Governor-General.

1939	VI	The British Baluchistan Criminal and Civil Justice and Laws Extension Regulation, 1939.	In clause (c) of Section 3, for the item — <div style="display: flex; align-items: center;"> <div style="border-right: 1px solid black; padding: 0 5px;">"1934</div> <div style="border-right: 1px solid black; padding: 0 5px;">XXXIV</div> <div style="border-right: 1px solid black; padding: 0 5px;">The Indian Tariff Act, 1932.</div> <div style="padding: 0 5px;">Section 5 only."</div> </div> <p>the following item shall be substituted, namely :—</p> <div style="display: flex; align-items: center;"> <div style="border-right: 1px solid black; padding: 0 5px;">"1934</div> <div style="border-right: 1px solid black; padding: 0 5px;">XXXII</div> <div style="border-right: 1px solid black; padding: 0 5px;">The Indian Tariff Act, 1934.</div> <div style="padding: 0 5px;">Section 5 only."</div> </div>
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Act No. XXXIII of 1940.**The Indian Registration (Amendment) Act, 1940.**

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Indian Registration Act, 1908, for certain purposes.

WHEREAS it is expedient further to amend the Indian Registration Act, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

Short title.

1. This Act may be called the Indian Registration (Amendment) Act, 1940.

2. In section 18 of the Indian Registration Act, 1908 (hereinafter referred to as the said Act), after clause (c) the following clause shall be inserted, namely :—

"(cc) instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of a value less than one hundred rupees, to or in immoveable property;"

*Notes:—*The amendment brings S. 18 in conformity with S. 17.

Amendment of section 28, Act XVI of 1908.

3. In section 28 of the said Act,—

(a) for the word, brackets and letter "and (d)" the words, brackets, letters and figures "(d) and (e)", section 17, sub-section (2), in so far as such document affects immovable property," shall be substituted; and

(b) for the word, brackets and letter "and (c)" the word, brackets, and letters ", (c) and (cc)" shall be substituted.

*Notes:—*As the law stands at present, documents referred to in clauses (a) to (d) of S. 17 (1) fall for the purpose of registration under S. 28 whereas documents referred to in clause (e) of S. 17 (1) fall under S. 29. The result is that if a document of the kind referred to in clause (e) is registered at the office of a Sub-Registrar within whose jurisdiction no portion of the immovable property affected thereby is situate, there will be no index of the immovable property assigned by such instruments in any registration office. This defect has now been removed by the amendment of S. 18.

ACT NO. XXXIV OF 1940.

The Code of Civil Procedure (Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Code of Civil Procedure, 1908.

WHEREAS it is expedient further to amend the Code of Civil Procedure, 1908, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

1. This Act may be called the Code of *Short title.* Civil Procedure, (Amendment) Act, 1940.

Amendment of section 29, Act V of 1908. 2. (1) In section 29 of the Code of Civil Procedure, 1908 (hereinafter referred to as the said Code),—

(a) in the paragraph preceding the proviso—

(i) after the word "Summonses" the words "and other processes" shall be inserted;

(ii) for the words "had been" the words "were summonses" shall be substituted; and

(b) in the proviso—

(i) after the word "summonses" the words "or processes" shall be inserted;

(ii) for the words "by whose Courts a summons is" the words "of the Province in which such summonses or processes are" shall be substituted;

(iii) for the words "Courts of the Province" the words "such Courts" shall be substituted.

(2) The substitution made in the said Code by sub-clause (iii) of clause (b) of sub-section (1) and the substitution so made by sub-clause (ii) of the said clause with the omission of the words "or processes" shall be deemed to have taken effect on the 1st day of April, 1937.

*Notes:—*The proviso to section 29 after its adaptation by the A. O. in 1937, produced the curious result that the Courts of the Province mentioned in the notification would be required to serve summonses issued by Courts of any country outside British India irrespective of whether or not such country has entered into a reciprocal arrangement in this behalf with British India. The amendment of section 29 has now rectified this mistake.

3. In clause (b) of sub-section (2) of *Amendment of section 48, Act V of 1908.* section 48 of the said Code, for the figures and words "180 of the Second Schedule to the Indian Limitation Act, 1877" the figures and words "183 of the First Schedule to the Indian Limitation Act, 1908" shall be substituted.

ACT NO. XXXV OF 1940.

The Code of Criminal Procedure (Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Code of Criminal Procedure, 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

Short title and commencement. 1. (1) This Act may be called the Code of Criminal Procedure (Amendment) Act, 1940.

(2) It shall come into force on such date

as the Central Government may, by notification in the official Gazette, appoint in this behalf.

2. After sub-section (2) of section 503 of *Amendment of section 503, Act V of 1898.* the Code of Criminal Procedure, 1898 (hereinafter referred to as the said Act), the following sub-section shall be

inserted, namely :—

"(2A) When the witness resides in British Burma, the commission may be issued to any District Magistrate or Magistrate of the first class within the local limits of whose jurisdiction in British Burma such witness resides."

Insertion of new section 508A in Act V of 1898.

inserted, namely :—

"508A. The provisions of sub-section (3)

Application of this Chapter to commissions issued in British Burma.

of section 503, sub-sections (1) and (1A) of section 504 and so much of sections 505 and 507 as relates to the execution of a commission and its return by the Magistrate or officer

3. After section 508 of the said Act the following section shall be

to whom the commission is directed shall apply in respect of commissions issued by a Magistrate or Court in British Burma under the law in force in British Burma relating to commissions for the examination of witnesses, as they apply to commissions issued under section 503 or section 506."

Notes. — Since the separation of the Province of Burma from British India, it was no longer possible for British Indian Courts to obtain the evidence of witnesses in Burma on commission in criminal cases. The amendment of section 503 now empowers British Indian Courts to issue commissions to any District Magistrate or Magistrate of the first class in British Burma to take evidence of persons residing within the local limits of his jurisdiction. The insertion of new section 508A also empowers the British Indian Courts to execute commissions issued by the Courts in British Burma.

ACT No. XXXVI OF 1940.

The Indian Companies (Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Indian Companies Act, 1913.

WHEREAS it is expedient further to amend the Indian Companies Act, 1913, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

1. (1) This Act may be called the Indian *Short title and commencement.* Companies (Amendment) Act, 1940.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. After section 244A of the Indian Companies Act, 1913, the following section shall be inserted, namely :—

Insertion of new section 244B in Act VII of 1913.
"244B. (1) Where any company is being wound up, if the liquidator has in his hands or under his control any money of the company representing unclaimed dividends payable to any creditor or undistributed assets refundable to any contributory which have remained unclaimed or undistributed for six months after the date on which they became payable or refundable, the liquidator shall forthwith pay the said money into the Reserve Bank of India to the credit of the Central Government in an account to be called the Companies Liquidation Account, and the liquidator shall, on the dissolution of the company, similarly pay into the said account any

money representing unclaimed dividends or undistributed assets in his hands at the date of dissolution.

(2) The liquidator shall, when making any payment referred to in sub-section (1), furnish to such officer as the Central Government may appoint in this behalf a statement in the prescribed form setting forth in respect of all sums included in such payment the nature of the sums, the names and last known addresses of the persons entitled to participate therein, the amount to which each is entitled and the nature of his claim thereto, and such other particulars as may be prescribed.

(3) The receipt of the Reserve Bank of India for any money paid to it under sub-section (1) shall be an effectual discharge of the liquidator in respect thereof.

(4) Where the company is being wound up by the Court, the liquidator shall make the payments referred to in sub-section (1) by transfer from the special banking account referred to in sub-section (3) of section 244A, and where the company is wound up voluntarily, or subject to the supervision of the Court, the liquidator shall, when filing a statement in pursuance of sub-section (1) of section 244, indicate the sum of money which is payable to the Reserve Bank of India under sub-section (1) which he has had in his hands or under his control dur-

ing the six months preceding the date to which the said statement is brought down, and shall, within fourteen days of the date of filing the said statement, pay that sum into the Companies Liquidation Account.

(5) Any person claiming to be entitled to any money paid into the Companies Liquidation Account in pursuance of this section may apply to the Court for an order for payment thereof, and the Court, if satisfied that the person claiming is entitled, may make an order for the payment to that person of the sum due:

Provided that before making such order the Court shall cause a notice to be served on such officer as the Central Government may appoint in this behalf calling on the officer to show cause within one month from the date of the service of the notice why the order should not be made.

(6) Any money paid into the Companies Liquidation Account in pursuance of this section, which remains unclaimed thereafter for a period of fifteen years, shall be transferred to the general revenue account of the Central Government; but any claim preferred under sub-section (5) to any money so transferred shall be allowable as if such transfer had not been made, the order for payment on such claim being

treated as an order for refund of revenue.

(7) Any liquidator retaining any money which should have been paid by him into the Companies Liquidation Account under this section shall pay interest on the amount retained at the rate of twenty per cent. per annum and shall also be liable to pay any expenses occasioned by reason of his default, and, where the winding up is by or under the supervision of the Court, he shall also be liable to disallowance of all or such part of his remuneration as the Court may think just and to be removed from his office by the Court.

(8) Nothing in this section shall apply in relation to companies with objects confined to a single Province which are not trading corporations."

Notes.—The Indian Companies Act, 1913, did not contain provisions for the custody of unclaimed dividends and undistributed assets of companies in liquidation or for the disposal of subsequent lawful claims to such money and in the absence of such provisions there was a considerable diversity of opinion as to the law applicable to these matters in British India. The new section 244B is designed to rectify this unsatisfactory position. It follows generally the lines of the English Companies Act, 1929, sections 285 and 300 and the relevant provisions of the English Companies (winding-up) Rules, 1929 (rules 196 to 201) with such modifications as are suited to Indian conditions.

ACT No. XXXVII OF 1940.

The War Donations and Investments (Companies) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war.

WHEREAS it is expedient to enable companies in British India to make donations to public funds formed, and to make investments in Government loans floated, for the purpose of assisting the prosecution of the present war;

AND WHEREAS it is also expedient to remove doubts as to the legality of such donations and investments where already made;

It is hereby enacted as follows :—

1. This Act may be called the War Donations and Investments (Companies) Act, 1940.

2. In this Act "Government loan" includes a loan floated by the Government of the United Kingdom.

3. Any company formed and registered under the Indian Companies Act, 1913, or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act or Acts repealed thereby may, notwithstanding anything contained in the Indian Companies Act, 1913, and notwithstanding that the memorandum of association or the articles of association of the company do not enable it so to do, by special resolution authorise the making of a donation from the company's assets to a public fund formed, or the making of an investment of the company's assets in a Government loan floated, for the purpose of assisting the prosecution of the present war.

4. Any donation to a public fund formed, and any investment in a Government loan floated, for the purpose of assisting the prosecution of the present war made by any company to which this Act applies between the 3rd day of September, 1939, and the commencement of this Act shall be as valid in all respects as if it had been made in accordance with the provisions of section 3, and after the commencement of this Act.

5. If any question arises whether for the purposes of this Act a loan is a Government loan floated for the purpose of assisting the prosecution of the present war or whether a fund is a public

fund formed for the purpose of assisting the prosecution of the present war, the question shall be decided by the Central Government whose decision shall be final.

Notes. — Cases have come to light in which certain clubs registered under the Indian Companies Act, 1913 have felt themselves legally debarred from making donations to war funds because their memoranda of association do not authorize such donations and those memoranda cannot be altered under the existing provisions of the Act so as to make such contributions permissible. The War Donations and Investments (Companies) Act, 1940, enables a company, registered under that Act, whether a club or not, to make any contributions it wishes, to war funds notwithstanding any legal impediments of the character mentioned above. The Act gives retrospective validation to any action of this kind already taken by a company since the outbreak of the war.

ACT NO. XXXVIII OF 1940.

The Reserve Bank of India (Third Amendment) Act, 1940.

[Recd. G. G.'s assent on 27th November 1940.]

An Act further to amend the Reserve Bank of India Act, 1934.

WHEREAS it is expedient further to amend the Reserve Bank of India Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows :—

1. This Act may be called the Reserve Bank of India (Third Amendment) Act, 1940.

2. After sub-section (3) of section 42 of the Reserve Bank of India Act, 1934, the following sub-section shall be inserted, namely :—

“(3A) When under the provisions of sub-section (3) penal interest at—the increased rate of five per cent. above the bank rate has become payable by a scheduled bank, if thereafter on the day fixed for the next return the balance held at the Bank is still below the prescribed minimum as disclosed by this return,—

(a) every director and any managing agent, manager or secretary of the scheduled bank, who is knowingly and wilfully a party to the default, shall be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each subsequent day on which the default continues, and

(b) the Bank may prohibit the scheduled bank from receiving after the said day any fresh deposit,

and, if default is made by the scheduled bank in complying with the prohibition referred to in clause (b), every director and officer of the scheduled bank who is knowingly and wilfully a party to such default or who through negligence or otherwise contributes to such default shall in respect of each such default be punishable with fine which may extend to five hundred rupees and with a further fine which may extend to five hundred rupees for each day after the first on which a deposit received in contravention of such prohibition is retained by the scheduled bank.

Explanation.—In this sub-section ‘officer’ includes a managing agent, manager, secretary, branch manager and branch secretary.’

Notes.—Under section 42 of the Reserve Bank of India Act, 1934, a scheduled bank is required to maintain daily with the Reserve Bank a minimum balance equal to five per cent. of its demand liabilities and two per cent. of its time liabilities and in case of default the Reserve Bank is entitled to charge interest at penal rates on the amount of default. There was, however, no provision in the Act to prevent the bank from withdrawing its deposit even upto the full amount, provided it is prepared to accept the liability to pay this penal interest on the resulting deficiency. Section 42, as amended, now prescribes a suitable penalty and gives powers to the Reserve Bank to prohibit defaulting banks from accepting fresh deposits during the continuation of the default.

The Motor Spirit (Duties) Amendment Act, 1940.

[Recd. G.G.'s assent on 27th November 1940.]

An Act further to amend the Motor Spirit (Duties) Act, 1917.

WHEREAS it is expedient further to amend the Motor Spirit (Duties) Act, 1917, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

1. This Act may be called the Motor Spirit (Duties) Amendment Act, 1940.

2. In section 2 of the Motor Spirit (Duties) Act, 1917, for the definition of motor spirit the following shall be substituted, namely :—

“Motor spirit” means :

(a) any inflammable hydrocarbon (in-

cluding any mixture of hydrocarbons or any liquid containing hydrocarbons) which is capable of being used for providing reasonably efficient motive power for any form of motor vehicle, and

(b) power alcohol, that is ethyl alcohol of any grade (including such alcohol when denatured or otherwise treated) which, either by itself or in admixture with any such hydrocarbon, is capable of being used as aforesaid.’—

Notes. — Section 2 of the Motor Spirit (Duties) Act, II of 1914 has been amended so as to make power alcohol dutiable independently of petrol by bringing it in its unmixed form within the definition of “Motor Spirit”.

ACT No. XL OF 1940.**The Indian Income-tax (Amendment) Act, 1940.**

[Recd. G. G.'s assent on 3rd December 1940.]

An Act further to amend the Indian Income-tax Act, 1922, and to make certain transitory provisions with respect to the operation of that Act on the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939.

WHEREAS it is expedient further to amend the Indian Income-tax Act, 1922, for the purposes hereinafter appearing, and to make certain transitory provisions with respect to the operation of that Act on the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939;

It is hereby enacted as follows :—

1. This Act may be called the Indian Income-tax (Amendment) Act, 1940.

2. For clause (6) of section 2 of the Indian Income-tax Act, 1922 (hereinafter referred to as the said Act), the following clause shall be substituted, namely :—

“(6) “company” means a company as defined in the Indian Companies Act, 1913, or formed in pursuance of an Act of Parliament or of Royal Charter or Letters Patent, or of an Act of the Legislature of a British possession or of a law of an Indian State, and includes any foreign association, whether incorporated or not, which the Central Board of Revenue may, by general or special order, declare to be a company for the purposes of this Act;”

Notes : — This definition differs from the previous definition of “company” in this that it now includes a company formed in pursuance of a law of an Indian State and also dispenses with the condition that a foreign association, in order to be declared a ‘company’ must be carrying on business in British India.

Amendment of section 5, Act XI of 1922. 3. (1) In section 5 of the said Act,—

(a) in sub-section (3), the words “for any area” shall be omitted;

(b) in sub-sections (4) and (5), for the words “and of such incomes or classes of income and” the words “or of such incomes or classes of income or” shall be substituted;

(c) in sub-section (4), for the words “and, where two or more Appellate Assistant Commissioners have been appointed for the same area” the following words shall be substituted, namely :—

“and, where such directions have assigned to two or more Appellate Assistant Commissioners of Income-tax, the same persons or classes of persons or the same incomes or classes of income or the same area”;

(d) in sub-section (5), for the words “and, where two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers have been appointed for the same

area" the following words shall be substituted, namely:—

"and, where such directions have assigned to two or more Inspecting Assistant Commissioners of Income-tax or Income-tax Officers, the same persons or classes of persons or the same incomes or classes of income or the same area";

(e) in sub-section (6), for the words "and for such area" the words "or such area" shall be substituted, the words "within the specified area" shall be omitted, and after the words "specified classes of persons or classes of income" the words "or area" shall be inserted;

(f) after sub-section (7) the following sub-section shall be inserted, namely:—

"(7A) The Commissioner of Income-tax may transfer any case from one Income-tax Officer subordinate to him to another, and the Central Board of Revenue may transfer any case from any one Income-tax Officer to another. Such transfer may be made at any stage of the proceedings, and shall not render necessary the re-issue of any notice already issued by the Income-tax Officer from whom the case is transferred."

(2) The amendments made by clauses (a), (b), (c), (d), and (e) of sub-section (1) shall be deemed to have taken effect on the 1st day of April 1939.

Notes:— The amendments of S. 5 are designed to set forth more clearly and to supplement the powers of the department in fixing jurisdictions, to minimise mere procedural difficulties and to prevent overlapping of jurisdictions.

Insertion of headings after section 5, and amendment of section 5A of Act XI of 1922.

4. After section 5 of the said Act the following headings shall be inserted, namely:—

"CHAPTER II-A.

APPELLATE TRIBUNAL."

and in sub-section (8) of section 5A for the word "place" the word "places" shall be substituted.

5. In sub-section (1) of section 9 of the said Act, in clause (vii), for the words "the net annual value after deducting the foregoing allowances," in both places where they occur, the words "the annual value" shall be substituted.

6. To sub-section (3A) of section 18 of the said Act the following provisos shall be added, namely:—

"Provided that where the person so payable is a British subject as defined in sec-

tion 27 of the British Nationality and Status of Aliens Act, 1914, or a subject of a State in India or Burma, and the Income-tax Officer gives a certificate in writing (which certificate he shall give in every proper case on the application of the assessee) that to the best of his belief the total world income of such person will be less than the minimum liable to income-tax or that his total income will be liable to a rate of income-tax less than the maximum rate, the person responsible for paying any income referred to in this sub-section shall, until such certificate is cancelled by the Income-tax Officer, pay the income without deduction or deduct the tax at such less rate, as the case may be:

Provided further that nothing in this sub-section shall apply to any payment made in the course of transactions in respect of which the person responsible for making the payment is deemed under the first proviso to section 43 not to be an agent of the payee."

Amendment of section 23A, Act XI of 1922. 7. In sub-section (1) of section 23A of the said Act,—

(a) after the words "in general meeting" the words "increased by any income-tax payable thereon" shall be omitted;

(b) after the words "the assessable income of the company of that previous year" the words "as reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted;

(c) after the words "as computed for income-tax purposes" the words "and reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted;

(d) in the first proviso, the words "of the assessable income," in both places where they occur, shall be omitted;

(e) in the second proviso, the words "as reduced by the amount of income-tax and super-tax payable by the company in respect thereof" shall be inserted after the words "fifty-five per cent. of the assessable income of the company" and shall also be added at the end of the proviso.

8. In the proviso to sub-section (1) of section 28 of the said Act, after clause (c) the following clause shall be added, namely:—

"(d) when the person liable to penalty is a registered firm, or an unregistered firm treated under section 23 (5) (b) as a regis-

tered firm, so that the amount of the income-tax and super-tax payable by the firm itself has not been determined, that amount shall be taken to be an amount equal to the tax which would have been payable by an unregistered firm on an income equal to the firm's total income, and, in the cases referred to in clauses (b) and (c), the amount of the income-tax and super-tax which would have been avoided if the income as returned had been accepted as the correct income, shall be taken to be the difference between the amount of the tax which would have been payable by an unregistered firm on an income equal to the firm's total income and the amount of the tax payable by an unregistered firm on an income equal to the income of the firm as actually returned by the firm."

9. After sub-section (3) of section 58B of the said Act the following sub-section shall be inserted, namely:—

"(3A) An order according recognition to a provident fund shall not, unless the Commissioner otherwise directs, be affected by the fact that the fund is subsequently amalgamated with another provident fund on the occurrence of an amalgamation of the undertakings in connection with which the two funds are maintained, or that it subsequently absorbs the whole or a part of another provident fund belonging to an undertaking which is wholly or in part transferred to or merged in the undertaking of the employer maintaining the first mentioned fund."

Amendment of section 58C, Act XI of 1922. 10. (1) In sub-section (1) of section 58C of the said Act,—

(a) to clause (a) the following proviso shall be added, namely:—

"Provided that the Commissioner may, if he thinks fit and subject to such conditions, if any, as he thinks proper to attach to the recognition, accord recognition to a fund maintained by an employer whose principal place of business is not in British India notwithstanding that a proportion not exceeding ten per cent. of the employees is employed outside India.";

(b) to clause (b) the following proviso shall be added, namely:—

"Provided that an employee who retains his employment while serving in His Majesty's Forces or when taken into or employed in the national service under the National Service (European British Subjects) Act, 1940, or the National Service

(Technical Personnel) Ordinance, 1940, may, notwithstanding that he receives from the employer no salary or a salary less than he would have received had he not entered His Majesty's Forces, or been so taken into or employed in the national service, contribute to the fund during his service in His Majesty's Forces or while so taken into or employed in the national service a sum not exceeding the amount he would have contributed had he continued to receive from the employer the same salary (including increments, if any) as he would have received had he not entered His Majesty's Forces or been taken into or employed in the national service.";

(c) in clause (d), after the words "contributions as above specified" the words "and of donations, if any, received from the trustees" shall be inserted, and for the words "contributions and accumulations" the words "contributions, donations and accumulations" shall be substituted.

(2) The amendment made by clause (b) of sub-section (1) shall be deemed to have been made and to have taken effect on the 3rd day of September 1939.

11. In sub-section (1) of section 61 of the said Act, after the word "before" the words "the Appellate Tribunal or" shall be inserted.

12. In clause (b) of sub-section (5) of section 64 of the said Act, after the words "where by" the words "any direction given or" shall be inserted, and after the word and figure "section 5" the words, brackets, figures and letter "or in consequence of any transfer made by him under sub-section (7A) of section 5" shall be inserted.

13. In the Schedule to the said Act, in rule 9, for the words "by a mutual insurance company" the words "by a mutual insurance association" shall be substituted.

Transitory provisions with respect to operation of Act XI of 1922. 14. Notwithstanding the coming into force of Part II of the Indian Income-tax (Amendment) Act, 1939,—

(a) all appeals already duly instituted under section 32 of the Indian Income-tax Act, 1922, at the time when the said Part II comes into force,

(b) all proceedings then pending before the Commissioner in connection with the

exercise of his powers of revision under section 33,

(c) all applications to the Commissioner, then pending, for reference to the High Court under sub-section (2) of section 66, and

(d) all applications to the High Court, then pending, for the issue of a requisition to the Commissioner under sub-section (3) of section 66,

may be continued and disposed of as if the said Part II had not come into force, and the provisions of sub-sections (2), (3), (3A), (4), (5) and (6) of section 66, as subsisting before the said Part II came into force, shall continue to have effect in relation to the appeals and proceedings referred to in clauses (a) and (b):

Provided that where under the provisions of section 33 of the Indian Income-tax

Act, 1922, as substituted by the Indian Income-tax (Amendment) Act, 1939, an assessee becomes entitled to appeal to the Appellate Tribunal against any order passed by an Appellate Assistant Commissioner under section 28 or section 31 in respect of which he has already lodged an appeal to the Commissioner under section 32 or made any application to the Commissioner for the exercise of his powers of revision under section 33, he may at his option elect to proceed with his appeal to the Commissioner or his application, as the case may be, in which case he shall lose his right of appeal to the Appellate Tribunal, or he may elect to appeal to the Appellate Tribunal under section 33, in which case his appeal to the Commissioner or his application, as the case may be, shall lapse.

ACT NO. XLI OF 1940.

The Indian Sale of Goods (Amendment) Act, 1940.

[Recd. G. G.'s assent on 3rd December 1940.]

An Act to amend the Indian Sale of Goods Act, 1930.

WHEREAS it is expedient to amend the Indian Sale of Goods Act, 1930, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

1. This Act may be called the Indian Sale of Goods (Amendment) Act, 1940.

Short title.

2. After section 64 of the Indian Sale of Goods Act, 1930, the following section shall be inserted, namely:—

Insertion of new section 64A in Act III of 1930.

"64A. In the event of any duty of customs or excise on any goods being imposed, increased, decreased or remitted after the making of any contract for the sale of such goods without stipulation as to the payment of duty where duty was not chargeable at the time of the making of the contract, or for the sale of such goods duty-paid where duty was chargeable at that time,—

(a) if such imposition or increase so takes effect that the duty or increased duty, as the case may be, or any part thereof, is paid, the seller may add so much to the contract price as will be equivalent to the amount paid in respect of such duty or increase of duty, and he shall be entitled to be paid and to sue for and recover such addition, and

(b) if such decrease or remission so takes

effect that the decreased duty only or no duty, as the case may be, is paid, the buyer may deduct so much from the contract price as will be equivalent to the decrease of duty or remitted duty, and he shall not be liable to pay, or be sued for or in respect of, such deduction."

Repeal of section 10 of Act XXXII of 1934.

3. (1) Section 10 of the Indian Tariff Act, 1934, is hereby repealed.

(2) Nothing in the repeal effected by sub-section (1) shall affect or be deemed to affect —

(a) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(b) any legal proceedings or remedy in respect of any such right, title, interest, obligation or liability, or

(c) anything done or suffered before the commencement of this Act.

Notes.—In a recent decision of the Lahore High Court, it was held that since the wording of the preamble of the Indian Tariff Act, 1934, refers only to customs duties on goods imported into or exported from British India S. 10 of that Act which permits the addition to or deduction from a contract price of an increase or decrease in duty imposed after the making of the contract does not apply to the excise duty on sugar produced in British India and intended to be sold within the country for home consumption. In order to put the matter beyond doubt, S. 10 of the Indian Tariff Act, 1934, has been repealed and the same has been re-enacted as S. 64A of the Indian Sale of Goods Act.

Excess Profits Tax (Amendment) Act, 1940.

[Recd. G. G.'s assent on 3rd December 1940.]

An Act to amend the Excess Profits Tax Act, 1940.

WHEREAS it is expedient to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

*Notes:—*The object of this amending Act is to remedy certain hardships and anomalies which were likely to arise.

Short title, commencement and effect. 1. (1) This Act may be called the Excess Profits Tax (Amendment) Act, 1940.

(2) It shall come into force at once; but its provisions shall be deemed to have taken effect on the day on which the Excess Profits Tax Act, 1940, came into force.

Amendment of section 2, Act XV of 1940. 2. In clause (21) of section 2 of the Excess Profits Tax Act, 1940 (hereinafter referred to as the said Act), for sub-clause (b) the following sub-clauses shall be substituted, namely:—

“(b) in relation to a business carried on by a partnership of which one or more of the partners is a body corporate (other than a company the directors whereof have a controlling interest therein), such a rate per cent. as is equivalent to—

“(i) eight per cent. per annum on so much of the average amount of the capital employed in the business during the chargeable accounting period as represents the share of any such body corporate, and

(ii) ten per cent. per annum on the remainder of that amount;

(c) in relation to a business to which neither sub-clause (a) nor sub-clause (b) applies, ten per cent. per annum:”.

Amendment of section 6, Act XV of 1940. 3. In sub-section (3) of section 6 of the said Act, after the word and figure “section 13” the following words shall be inserted, namely:—

“or within the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section” and to the sub-section the following proviso shall be added, namely:—

“Provided further that a determination on an application under this sub-section—

(a) shall have effect with respect to all subsequent chargeable accounting periods;

(b) shall exclude any further application under this sub-section.”

Amendment of section 8, Act XV of 1940. 4. In section 8 of the said Act,—

(a) in sub-section (3), after the words “in computing the capital employed in the business after the change”, and in sub-section (4), after the words “in computing the capital employed in the resulting business” the following words shall be inserted, namely:—

“and in considering, for the purposes of computing the profits of, and the capital employed during, any chargeable accounting period, whether any and, if so, what deductions are to be made in respect of depreciation of buildings, plant and machinery,”;

(b) in sub-section (5), the words “subject to any necessary modifications” shall be omitted;

(c) in sub-section (6), the words “subject, however, to such modifications (including modifications as respects the computation of capital) as he may consider just” shall be omitted;

(d) after sub-section (7) the following sub-section shall be added, namely:—

“(8) Where—

(a) a business is, by virtue of sub-section (2) or sub-section (3), deemed not to have been discontinued; or

(b) a business is, by virtue of sub-section (4), to be treated as if it had been in existence throughout the period during which there was in existence any other business; or

(c) a business is, by virtue of sub-section (5), to be treated as a continuation of another business; or

(d) any person who is carrying on a business after a transfer is treated, by virtue of sub-section (6), as having carried on the business as from a date before the transfer, the provisions of this Act relating to the computation of profits and capital for the purposes of excess profits tax shall, both as respects the standard period and any chargeable accounting period, have effect subject to such modifications, if any, as the Excess Profits Tax Officer may think just, and the Excess Profits Tax Officer may make such alterations in the periods which would otherwise be the chargeable accounting periods of the business as he thinks proper:

Provided that if the Excess Profits Tax Officer makes any such modifications and the person carrying on the business is dissatisfied with the modifications so made, or if the person carrying on the business is

dissatisfied with the refusal of the Excess Profits Tax Officer to make any such modifications, he may, at any time before the expiry of forty-five days from the date on which the order of the Excess Profits Tax Officer is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer."

Amendment of section 9, Act XV of 1940. 5. After sub-section (1) of section 9 of the said Act the following sub-section shall be inserted, namely:—

"(1A) Where—

(a) any debt is owing to any company by another company; and

(b) one of those companies is a subsidiary of the other, or both are subsidiaries of a third company; and

(c) no interest is payable in respect of the debt, but the circumstances in which the debt came into existence or is allowed to continue to exist are such that the debt represents in substance capital employed in the business of the debtor company, the capital of both companies shall be computed as if the debt did not exist."

Amendment of section 12, Act XV of 1940. 6. In sub-section (2) of section 12 of the said Act,—

(a) for the words "to the extent that such profits arose in the said country" the words "to the extent to which such profits are liable to excess profits tax under this Act" shall be substituted;

(b) in the proviso, for the words "chargeable accounting period", where those words occur for the second time, the following shall be substituted, namely:—

"previous year (as determined for that business for the purposes of the Indian Income-tax Act, 1922)".

Notes:— The amendment of S. 12(2) of the Act as made by clause (a) above, corrects the hardship that existed where a United Kingdom company paid in the United Kingdom 100 per cent. of its excess profits the whole of its profits being earned in India, and received no allowance for such excess profits tax in computing the profits for Indian Income-tax purposes because none of the profits actually arose in the United Kingdom.

7. For the second proviso to sub-section

Amendment of section 17, Act XV of 1940. (1) of section 17 of the said Act the following shall be substituted, namely:—

"Provided further that no appeal shall lie under this section against any apportionment made by the Excess Profits Tax Officer under the proviso to sub-section (5) of 1941 Acts/8

section 8, against any modifications made by the Excess Profits Tax Officer under sub-section (8) of section 8, against any decision of the Excess Profits Tax Officer under rule 11 of the First Schedule, or against any decision of the Board of Referees or the Central Board of Revenue."

Amendment of section 26, Act XV of 1940. 8. In section 26 of the said Act,—

(a) in sub-section (1) and in sub-section (3), after the word "If" the following words shall be inserted, namely:—

"on an application made to it through the Excess Profits Tax Officer";

(b) to sub-section (1) the following proviso shall be added, namely:—

"Provided further that a determination on an application under this sub-section—

(a) shall have effect with respect to all subsequent chargeable accounting period;

(b) shall exclude any further application under this sub-section.";

(c) after sub-section (3) the following sub-section shall be added, namely:—

"(4) An application to the Central Board of Revenue under this section shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section, but in the case of an application under sub-section (1) of this section, if the person carrying on the business has made or is making an application under sub-section (3) of section 6, the application shall be presented to the Excess Profits Tax Officer before the expiry of forty-five days from the date on which the order of the Board of Referees disposing of the application under sub-section (3) of section 6 is communicated to the person who has made that application."

Notes:— The amendment of S. 26 (1) and (3) rectifies the omission to provide for the manner in which and within what time-limits an application is to be made to the Central Board of Revenue.

Amendment of Schedule I, Act XV of 1940. 9. In Schedule I to the said Act,—

(a) in rule 1, in the first proviso, after the word "Provided" the word "further" shall be inserted, and before that proviso, as so amended, the following proviso shall be inserted, namely:—

"Provided that any sums excluded under the proviso to clause (iii) of sub-section (2) or clause (a) of sub-section (4) of that section from the allowances made in

computing the profits of the business for the purposes of income-tax shall, if paid, be included in those allowances when computing the profits of the business for the purposes of excess profits tax : ”;

(b) in rule 4,—

(i) in sub-rule (1) after the brackets and figure “(2)” the brackets, figure and letter “(2A)” shall be inserted ;

(ii) after sub-rule (2) the following sub-rule shall be inserted, namely :—

“(2A) In the case of a business part of which consists in banking, insurance or dealing in investments, not being a business to which sub-rule (2) of this rule applies, the profits shall include all income received from investments held for the purposes of that part of the business, being income to which the persons carrying on the business are beneficially entitled.”;

(iii) in sub-rule (3), after the brackets and figure “(2)” the word, brackets, figure and letter “or (2A)” shall be inserted ;

(c) in rule 7,—

(i) for sub-rule (1) the following sub-rule shall be substituted, namely :—

“(1) In the case of a business carried on, in any accounting period which constitutes or includes a chargeable accounting period, by a company the directors whereof have throughout that accounting period a controlling interest therein—

(a) in computing the profits for that accounting period ; and

(b) if the standard profits of the business are computed by reference to the profits of a standard period, also in computing, in relation to any such chargeable accounting period, the profits for the standard period, no deduction shall be made in respect of directors’ remuneration.”;

(ii) in sub-rule (2), for the words “In this rule” the words, brackets and figure “In sub-rule (1) of this rule” shall be substituted ;

(iii) after sub-rule (2) the following sub-rule shall be added, namely :—

“(3) if, in the case of a business carried on by a company in any accounting period which constitutes or includes a chargeable accounting period, the directors of the company—

(a) have during any part of that accounting period, or

(b) had during the whole or any part of any previous accounting period which includes the whole or any part of any chargeable accounting period or the whole or any part of the standard period (if any),

a controlling interest therein, and the case is not one to which sub-rule (1) of this rule applies, then, except in so far as the Central Board of Revenue otherwise directs, no deduction shall be made in respect of directors’ remuneration either in computing the profits for the first mentioned accounting period or in computing in relation to any chargeable accounting period wholly or partly included in that accounting period, the profits of the standard period (if any).”;

Notes :— The amendment of Rule 7, Sch. I of the Act corrects the anomaly by which, in the case of a director-controlled company, while the excess of directors’ remuneration in a chargeable accounting period over that in the standard period was disallowed, no allowance could be made in the converse position. It further provides for proper adjustments being made in a case where a company was director-controlled in the standard period but not in a chargeable accounting period or where the converse position obtains.

(d) after rule 10, the following rule shall be added, namely :—

“11. Where in respect of any accounting period a deduction would, apart from the provisions of this rule, be allowable in computing profits, and, in the opinion of the Excess Profits Tax Officer, the deduction does not represent a sum reasonably and properly attributable to that accounting period, only such part of the deduction shall be allowable as a deduction for that period as appears to the Excess Profits Tax Officer to be reasonably and properly attributable to that period, and any balance of the deduction shall be treated as attributable to such other accounting period or periods (whether or not they include, or fall wholly or partly within, the standard period, if any, or any chargeable accounting period) as the Excess Profits Tax Officer thinks proper.

Any person who is dissatisfied with a determination of the Excess Profits Tax Officer under this rule may, at any time before the expiry of forty-five days from the date on which such determination is communicated to him, appeal to the Board of Referees through the Excess Profits Tax Officer.”

Amendment of Schedule II, Act XV of 1940. 10. In Schedule II to the said Act,—

(a) in sub-rule (2) of rule 1, after the words “written down value” the following words shall be inserted, namely :—

“and to such other deductions in respect of reduced values of assets as are allowable in computing profits for the purposes of income-tax”;

(b) at the end of sub-rule (1) of rule 2 the following shall be inserted, namely:—

"The debts to be deducted under this sub-rule shall include any such sums in respect of accruing liabilities as are allowable as a deduction in computing profits for the purposes of excess profits tax or would have been so allowable if the period for which the amount of capital is being computed had been a chargeable accounting period; and the said sums shall be deducted notwithstanding that they have not become payable.";

(c) after rule 6 the following rule shall be added, namely:—

"7. (1) If—

(a) the Central Board of Revenue is satisfied, as respects any assets of any business the standard profits of which are computed by reference to the profits of a standard period, that during that period or any part thereof those assets were inherently unproductive, and

(b) an application that this rule shall have effect is made through the Excess Profits Tax Officer to the Central Board of Revenue by the person carrying on the business, then, in computing the average amount of the capital employed in the business in the standard period and in all chargeable

accounting periods, those assets, and any other assets of the business, shall be treated as not having been assets thereof during any part of the period during which, in the opinion of the Central Board of Revenue, they were inherently unproductive:

Provided that in the case of a business the standard profits of which depend directly or indirectly upon a direction of the Board of Referees under sub-section (3) of section 6, or of the Central Board of Revenue under sub-section (1) of section 26 of this Act the provisions of this rule shall have effect to such extent only as the Central Board of Revenue thinks proper:

Provided further that an application to the Central Board of Revenue under this rule shall be presented to the Excess Profits Tax Officer before the expiry of the period specified in the notice issued under sub-section (1) of section 13 of this Act or of the extended period allowed by the Excess Profits Tax Officer under the proviso to that sub-section.

(2) Where sub-rule (1) of this rule has effect on the application of the person carrying on any business, any computation of capital of the business made before the making of the application, and any assessment affected by that computation shall be revised accordingly."

ACT NO. I OF 1941.

The Insurance Deposits (Temporary Reduction) Act, 1941

[Recd. G. G.'s assent on 3rd March 1941.]

An Act to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938.

WHEREAS, in consequence of conditions arising out of the present war, it is expedient to provide for the reduction temporarily of the amounts payable as instalments of the sum to be deposited by an insurer under section 7 of the Insurance Act, 1938;

It is hereby enacted as follows:

1. (1) This Act may be called the Insurance Deposits (Temporary Reduction) Act, 1941.

(2) It extends to the whole of British India.

Notes.—As a result of falling business and lapsing of policies due to war conditions those young proprietary insurance companies whose business was relatively small found it difficult to pay the fixed amounts of the periodical instalments of the deposits required by the Insurance Act, 1938, and

were therefore in need of some relief. The object of this Act is to reduce for the duration of the war and one year afterwards the instalment of deposits due from such insurers carrying on life insurance business only subject to the provision of certain safeguards to prevent advantage being taken of the concession to incur increased expenditure or liabilities of an unjustifiable nature.

2. In this Act "insurer" means an insurer as defined in clause (9) of section 2 of the Insurance Act, 1938, except that it does not include a Mutual Insurance Company or a Co-operative Life Insurance Society to which Part IV of that Act applies.

3. (1) An insurer entitled to the benefits of this Act shall, subject to the provisions of

section 5, be deemed in respect of any instalment of the deposit to be made by him under section 7 of the Insurance Act, 1938, which he was required to pay during the year commencing on the 1st day of January, 1940, or which he may be required to pay at any time after the end of that year and so long as this section continues to have effect, to have complied with the provisions of the said section 7 as to payment of instalments of deposits, if he has paid or pays in accordance with the provisions of that section not less than one-half the total amount which would have been required by that section as the instalment, had the insurer not availed himself of the provisions of this Act.

(2) If an insurer entitled to the benefits of this Act, when paying an instalment of deposit, has, in respect of any instalment due during the year commencing on the 1st day of January, 1940, paid more than one half the total amount required by the said section 7 as the instalment, he may at his option have the amount of any such surplus payment appropriated to the payment of the next or any subsequent instalment of deposit required from him under the said section 7 read with sub-section (1) of this section.

(3) This section shall cease to have effect on the expiration of one year from such date as may be fixed, for the purposes of this Act, by the Central Government by notification in the official Gazette as the date of termination of the present hostilities.

Insurers entitled to the benefits of this Act. 4. An insurer shall be entitled to the benefits of this Act only if—

(a) he carries on life insurance business only, and

(b) the date on which he first assumed risk on any policy issued by him was earlier than the 3rd day of September, 1939, but not earlier than the 3rd day of September, 1929.

5. (1) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in any year if in

Cesser of title to the benefits of this Act. the preceding year his total premium income, including annuity considerations, as shown in the revenue-account prepared under the Insurance Act, 1938, exceeded rupees thirty thousand.

(2) An insurer otherwise entitled to the benefits of this Act shall cease to be so entitled in respect of any future instalment —

(a) if after the 1st day of January, 1941, he declares any bonus or dividend at a rate higher than the rate at which such bonuses or dividends were last declared by him before the 3rd day of September, 1939, or

(b) if the proportion of his renewal premium income spent by him in payment of commission and other expenses including capital expenditure, determined in accordance with Rule 25 of the Insurance Rules, 1939, exceeds in any year the proportion as so determined for the accounting period ending on the 31st day of December, 1939.

6. (1) When section 3 ceases to have effect, or if before that date an insurer ceases under clause (a) or clause (b) of sub-section (2) of section 5 to be entitled to the benefits of this Act, instalments of deposits shall be paid in accordance with the provisions of section 7 of the Insurance Act, 1938, (except that no insurer shall be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act), until the last instalment required to be paid under the said section 7 has been paid, and the balance of the deposit then remaining unpaid in consequence of the reduced instalments authorized under this Act shall be paid by the insurer in such further instalments, of such amount and at such times, as the Central Government may direct.

(2) If while section 3 continues to have effect an insurer ceases in any year under sub-section (1) of section 5 to be entitled to the benefits of this Act, instalments of deposit in that year shall be paid by him in accordance with the provisions of section 7 of the Insurance Act, 1938, except that he shall not be required to pay as an instalment an amount exceeding the amount which would have been payable by him had he not availed himself of the provisions of this Act, and the provisions of sub-section (1) of this section shall apply to the payment by such insurer of any balance of the deposit due from him which remains unpaid after the last instalment required to be paid under the said section 7 has been paid.

7. For the purposes of the Insurance Act, 1938, an insurer entitled to the benefits of this Act who has failed to pay before the 1st day of January, 1941, an instalment of deposit

due in the year 1940 shall not be liable to any consequences on that account in respect of a failure to comply with the provisions of section 7 of the said Act as to deposits if before the 15th day of February, 1941, he has paid as such instalment not less than one half the total amount required by the said

section 7.

8. If any difficulty arises in determining the amount payable as an instalment of deposit by an insurer under this Act, the matter shall be decided by the Central Government whose decision shall be final.

ACT NO. II OF 1941.

The Indian Merchandise Marks (Amendment) Act, 1941.

[Recd. G.G.'s assent on 11th March 1941.]

An Act further to amend the law relating to fraudulent marks on merchandise.

WHEREAS it is expedient further to amend the law relating to fraudulent marks on merchandise ;

It is hereby enacted as follows : —

1. (1) This Act may be called the Indian Short title and Merchandise Marks commencement. (Amendment) Act, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In section 2 of the Indian Merchandise Marks Act, 1889 (hereinafter, in sections 3 to 9 inclusive, referred to as the said Act), —

(a) for clause (1) the following clauses shall be substituted, namely : —

'(1) "mark" has the meaning assigned to that expression in clause (f) of sub-section (1) of section 2 of the Trade Marks Act, 1940 ;

(1A) "trade mark" means a "registered trade mark" as defined in clause (j) of sub-section (1) of section 2 of the Trade Marks Act, 1940, or a mark used in relation to goods for the purpose of indicating or so as to indicate a connexion in the course of trade between the goods and some person having the right as proprietor to use the mark ;'

(b) in sub-clause (e) of clause (2), for the words "numeral, word or mark" the word "mark" shall be substituted.

Notes : — The old definition of 'trade-mark' which was based on the United Kingdom Merchandise Marks Act gave rise to certain anomalies. The present definition confines itself to trade-marks which are used in British India and which might be registered under the Indian Trade Marks Act.

Amendment of section 4, Act IV of 1889. 3. In section 4 of the said Act, —

(a) in sub-section (1), for the words "numerals, words or marks," in both places

where they occur, the word "marks" shall be substituted ;

(b) in sub-section (2), after clause (b) the following word and clause shall be added, namely : —

"and

(c) being the name or initials of a fictitious person or of a person not carrying on business in connexion with goods of the same description."

Amendment of section 7, Act IV of 1889. 4. In section 7 of the said Act, —

(a) after the words "things to which a false trade description is applied" the following words shall be inserted, namely : —

"or which, being required by notification under section 12A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification ;"

(b) in clause (a), after the words "trade description" the following words shall be inserted, namely : —

"or that any offence against this section had been committed in respect of the goods."

Insertion of new section 7A in Act IV of 1889. 5. After section 7 of the said Act the following section shall be inserted, namely : —

"7A. If a person tampers with, alters or effaces a mark which has been applied to any goods to which it is required to be applied by notification made under section 12A, he shall, unless he proves that he acted without intent to defraud, be punished with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, and, in

the case of a second or subsequent conviction, with imprisonment which may extend to two years, or with fine, or with both."

6. In sub-section (1) of section 9 of the *Amendment of section 9, Act IV of 1889.* said Act, after the words "any goods or things to which a false trade description is applied" the following words shall be inserted, namely:—

"or which, being required by notification under section 12A to have applied to them an indication of the country or place in which they were made or produced, are without the indication required by such notification."

7. For section 12 of the said Act and the heading preceding that section the following section and heading shall be substituted, namely:—

"Stamping of Piece-goods, Cotton Yarn and Thread.

12. (1) Piece-goods, such as are ordinarily sold by length or by the piece, which have been manufactured, bleached, dyed, printed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from the last of such premises in which they underwent any of the said processes without having conspicuously stamped in English numerals on each piece the length thereof in standard yards, or in standard yards and a fraction of such a yard, according to the real length of the piece, and, except when the goods are sold from the factory for export from British India, without being conspicuously marked on each piece with the name of the manufacturer, or of the occupier of the premises in which the piece was finally processed or of the wholesale purchaser in India of the piece.

(2) Cotton yarn such as is ordinarily sold in bundles, and cotton sewing or darning thread, which have been manufactured, bleached, dyed or finished in premises which are a factory, as defined in the Factories Act, 1934, shall not be removed for sale from those premises unless, in accordance with any rules made under section 20 of this Act, in the case of yarn the bundles are conspicuously marked with an indication of the weight of yarn in each bundle and the count of the yarn contained in the bundle and in the case of thread each unit is conspicuously marked with the weight of thread in the

unit and the grist number and, except where the goods are sold from the factory for export from British India, unless each bundle or unit is conspicuously marked with the name of the manufacturer or of the wholesale purchaser in India of the goods.

(3) If any person removes or attempts to remove or causes or attempts to cause to be removed for sale from such premises or sells or exposes or has in possession for sale any such piece-goods or any such cotton yarn or any cotton sewing or darning thread which is not marked as required by sub-section (1) and sub-section (2), every such piece and every such bundle of yarn and all such thread, and everything used for the packing thereof, shall be forfeited to His Majesty and such person shall be punished with fine which may extend to one thousand rupees."

8. After section 12 of the said Act the following heading and section shall be inserted namely:—

"Power to require goods to show indication of origin.

12A. (1) The Central Government may, by notification in the official Gazette, require that goods of any class specified in the notification which are made or produced beyond the limits of British India and imported into British India, or which are made or produced within the limits of British India, shall, from such date as may be appointed by the notification not being less than three months from its issue, have applied to them an indication of the country or place in which they were made or produced.

(2) The notification may specify the manner in which such indication shall be applied, that is to say whether to the goods themselves or in any other manner, and the times or occasions on which the presence of the indication shall be necessary, that is to say whether on importation only, or also at the time of sale, whether by wholesale or retail or both.

(3) No notification under this section shall be issued, unless application is made for its issue by persons or associations substantially representing the interests of dealers in or manufacturers, producers, or users of the goods concerned, or unless the Central Government is otherwise convinced that it is necessary in the public interest to issue the notification, nor without such inquiry

as the Central Government may consider necessary.

(4) The provisions of section 23 of the General Clauses Act, 1897, shall apply to the issue of a notification under this section as they apply to the making of a rule or bye-law the making of which is subject to the condition of previous publication.

(5) A notification under this section shall not apply to goods made or produced beyond the limits of British India and imported into British India if in respect of those goods the Chief Customs Officer is satisfied at the time of importation that they are intended for exportation whether after transshipment in or transit through British India or otherwise."

Notes : — The insertion of new S. 12A provides for the chief object of the amending Act, namely, power to require that goods shall be marked with the country of origin. The method of marking proposed is designed both to make the marking requirements capable of being enforced efficiently through the administrative machinery available and to extend it at the same time to all cases where such marking is proved to be necessary and in the interests of the public.

Amendment of section 20, Act IV of 1889. 9. In section 20 of the said Act, after sub-section (1) the following sub-section shall be inserted, namely:—

"(1A) The Central Government may make rules providing for the manner in which for the purposes of section 12 cotton yarn and cotton sewing or darning thread shall be marked with the particulars required by that section."

Amendment of section 18, Act VIII of 1878. 10. In section 18 of the Sea Customs Act, 1878,—

(a) in clause (e),—

(i) for the words "the United Kingdom, British India and British Burma", in both places where they occur, and for the words "the United Kingdom or in British India or in British Burma" the words "British India" shall be substituted;

(ii) in sub-clause (ii), for the words "in the same language and character as the name or trade mark" the words "in the English language" shall be substituted;

(b) in clause (f),—

(i) sub-clauses (ii) and (iii) shall be re-numbered as sub-clauses (iii) and (iv), respectively, and the following shall be inserted as sub-clause (ii), namely:—

"(ii) have not been conspicuously marked on each piece with the name of the manufacturer, exporter or wholesale purchaser in India of the piece, and", and

(ii) in sub-clause (iv) as so re-numbered, for the words and figures "Indian Factories Act, 1881" the words and figures "Factories Act, 1934" shall be substituted;

(c) after clause (g) the following clauses shall be added, namely:—

"(h) goods which are required by a notification under section 12A of the Indian Merchandise Marks Act, 1889, to have applied to them an indication of the country or place in which they were made or produced, unless such goods show such indication applied in the manner specified in the notification:

(i) cotton yarn such as is ordinarily imported in bundles, if—

(i) the bundle containing such yarn has not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) such bundle has not been conspicuously marked with an indication of the weight and the count of the yarn contained in it, in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the yarn has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934;

(j) cotton sewing or darning thread, if—

(i) the units in which the thread is supplied have not been conspicuously marked with the name of the manufacturer, exporter or wholesale purchaser in India of the goods, or

(ii) if each unit has not been conspicuously marked with an indication of the weight of thread contained in it and the grist number in accordance with the rules made under section 20 of the Indian Merchandise Marks Act, 1889, and

(iii) the thread has been manufactured beyond the limits of India, or

(iv) having been manufactured within those limits, has been manufactured beyond the limits of British India in premises which, if they were in British India, would be a factory as defined in the Factories Act, 1934."

Amendment of section 19A, Act VIII of 1878.

11. In sub-section (3) of section 19A of the Sea Customs Act, 1878,—

(a) for the words "British India," in both places where they occur, the word "India" shall be substituted;

(b) for the words "and in the same language and character" the words "in the English language" shall be substituted.

Substitution of new section for section 478, Act XLV of 1860.

namely :—

'478. For the purposes of this Code, the expression "trade mark" includes a trade mark registered under the Trade Marks Act, 1940,

12. For section 478 of the Indian Penal Code the following section shall be substituted,

and any mark used in relation to goods for the purpose of indicating or so as to indicate a connexion in the course of trade between the goods and some person having the right to use the mark.'

13. In section 480 of the Indian Penal Code, for the words "are the manufacture or merchandise of a person whose manufacture or merchandise they are not" the following words shall be substituted, namely :—

"have a connexion in the course of trade with a person with whom they have not any such connexion"

The Petroleum (Amendment) Act, 1941.

[Recd. G. G.'s assent on 17th March 1941.]

An Act further to amend the Petroleum Act, 1934.

WHEREAS it is expedient further to amend the Petroleum Act, 1934, for the purpose hereinafter appearing ;

It is hereby enacted as follows :—

Short title. 1. This Act may be called the Petroleum (Amendment) Act, 1941.

2. For clause (c) of sub-section (1) of section 23 of the Petroleum Act, 1934, the following clause shall be substituted, namely:—

"(c) being the holder of a licence issued under section 4 or a person for the time being placed by the holder of such licence

in control or in charge of any place where petroleum is being imported or stored, or is under transport, contravenes any condition of such licence or suffers any condition of such licence to be contravened, or".

Notes. — Cases have occurred in which breaches of conditions of licences have been committed by agents, appointed by large oil companies, to be in charge of licensed premises but prosecutions launched against such agents have failed on the ground that agents are not holders of licences under the Act. The substitution of new clause (c) in S. 23 of the Act, for the old, now makes agents liable for punishment for breaches of conditions of licences, which they commit or are privy to, without freeing licensees from liability for breaches to which they are parties. (See Statement of Objects and Reasons.)

ACT No. IV OF 1941.**The Berar Laws Act, 1941.**

[Recd. G. G.'s assent on 17th March 1941.]

An Act to extend certain Acts to Berar.

WHEREAS by orders made under the Indian (Foreign Jurisdiction) Order in Council, 1902, the provisions of certain Acts in force in British India have from time to time been applied to, and are now, by virtue of such application, in force in, Berar :

AND WHEREAS it is expedient that those and certain other Acts should be extended to, and be, by virtue of such extension, in force in, Berar :

It is hereby enacted as follows :—

Notes.—Since the commencement of Part III of the Government of India Act, 1935, on the 1st April 1937, Berar and Central Provinces have been deemed to be one Governor's Province and an Act passed after that date and expressed to extend to the whole of British India does extend *proprio vigore* to Berar. The primary object of the present Act is to assimilate the position of Central Acts passed before the 1st day of April 1937 to that of those passed after that date and automatically in force in Berar, that is to say by means of one comprehensive enactment to extend to and make operative *proprio vigore* in Berar, Central Acts passed before the commencement of Part III of the Government of India Act while simultaneously nullifying the orders under the Foreign Jurisdiction Order in Council by virtue of which those Acts are operative in Berar.

Short title and commencement. 1. (1) This Act may be called the Berar Laws Act, 1941.

(2) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

1941 Acts/4

2. (1) The Acts specified in the First Schedule and so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws are hereby extended to, and shall be in force in, Berar; and in any enactment so extended any reference by whatever form of words to subjects of His Majesty shall be deemed to include a reference to Berari subjects of His Exalted Highness the Nizam of Hyderabad, and notwithstanding anything contained in clause (7) of section 8 of the General Clauses Act, 1897, any reference to British India shall be construed as a reference to British India and Berar.

(2) The Acts specified in the Third Schedule shall be amended in the manner set forth in the second column of that Schedule.

3. The application, if any, to Berar, made by order under the Indian (Foreign Jurisdiction) Order in Council, 1902, of the Acts specified in the First Schedule, of so much of any Act specified in the Second Schedule as relates to matters with respect to which the Central Legislature has power to make laws, and of the Indian Cotton Cess Act, 1923, shall cease to have effect :

Provided that all appointments, delegations, notifications, orders, bye-laws, rules and regulations, which have been made or issued under, or in pursuance of, any provision of any of the said Acts as applied to Berar by order under the said Order in Council, and which are in force at the commencement of this Act, shall be deemed to have been made or issued under or in pursuance of the corresponding provision of that Act as now extended to, and in force in, Berar.

4. For the removal of doubt it is hereby *Removal of doubt.* declared that the Acts specified in the Fourth Schedule have ceased to have effect and are repealed in Berar.

THE FIRST SCHEDULE

[See sections 2 (1) and 3.]

Acts Extended to Berar.

Year.	Number.	Short Title.
1850	XIX	The Apprentices Act, 1850.
1850	XXI	The Caste Disabilities Removal Act, 1850.
1855	XIII	The Indian Fatal Accidents Act, 1855.
1856	XI	The European Deserters Act, 1856.
1856	XV	The Hindu Widows' Re-marriage Act, 1856.
1860	XLV	The Indian Penal Code.
1864	III	The Foreigners Act, 1864.
1865	III	The Carriers Act, 1865.
1866	XXI	The Native Converts' Marriage Dissolution Act, 1866.
1867	XXV	The Press and Registration of Books Act, 1867.
1869	IV	The Indian Divorce Act.
1872	I	The Indian Evidence Act, 1872.
1872	III	The Special Marriage Act, 1872.
1872	IX	The Indian Contract Act, 1872.
1872	XV	The Indian Christian Marriage Act, 1872.
1873	V	The Government Savings Banks Act, 1873.
1873	X	The Indian Oaths Act, 1873.
1874	IX	The European Vagrancy Act, 1874.
1875	IX	The Indian Majority Act, 1875.
1875	XVIII	The Indian Law Reports Act, 1875.
1876	IX	The Native Coinage Act, 1876.
1877	I	The Specific Relief Act, 1877.
1878	VIII	The Sea Customs Act, 1878.
1878	XI	The Indian Arms Act, 1878.
1879	XVIII	The Legal Practitioners Act, 1879.
1881	XXVI	The Negotiable Instruments Act, 1881.
1882	II	The Indian Trusts Act, 1882.
1882	XII	The Indian Salt Act, 1882.
1884	IV	The Indian Explosives Act, 1884.
1888	III	The Police Act, 1888.

Year.	Number.	Short Title.
1889	IV	The Indian Merchandise Marks Act, 1889.
1890	VIII	The Guardians and Wards Act, 1890.
1890	XI	The Prevention of Cruelty to Animals Act, 1890.
1891	XVIII	The Bankers' Books Evidence Act, 1891.
1898	V	The Code of Criminal Procedure, 1898.
1901	II	The Indian Tolls (Army) Act, 1901.
1903	VII	The Indian Works of Defence Act, 1903.
1903	XV	The Indian Extradition Act, 1903.
1904	VII	The Ancient Monuments Preservation Act, 1904.
1905	IV	The Indian Railway Board Act, 1905.
1906	III	The Indian Coinage Act, 1906.
1908	V	The Code of Civil Procedure, 1908.
1908	VI	The Explosive Substances Act, 1908.
1908	IX	The Indian Limitation Act, 1908.
1908	XIV	The Indian Criminal Law Amendment Act, 1908.
1908	XVI	The Indian Registration Act, 1908.
1909	IV	The Whipping Act, 1909.
1910	IX	The Indian Electricity Act, 1910.
1911	II	The Indian Patents and Designs Act, 1911.
1911	VIII	The Indian Army Act, 1911.
1912	IV	The Indian Lunacy Act, 1912.
1913	II	The Official Trustees Act, 1913.
1913	III	The Administrator General's Act, 1913.
1914	III	The Indian Copyright Act, 1914.
1916	VII	The Indian Medical Degrees Act, 1916.
1917	II	The Motor Spirit (Duties) Act, 1917.
1917	XVIII	The Post Office Cash Certificates Act, 1917.
1918	XXII	The Bronze Coin (Legal Tender) Act, 1918.
1919	XII	The Poisons Act, 1919.
1920	V	The Provincial Insolvency Act, 1920.
1920	XIV	The Charitable and Religious Trusts Act, 1920.
1920	XV	The Indian Red Cross Society Act, 1920.
1920	XLVII	The Imperial Bank of India Act, 1920.
1920	XLVIII	The Indian Territorial Force Act, 1920.
1920	XLIX	The Auxiliary Force Act, 1920.
1921	XVIII	The Maintenance Orders Enforcement Act, 1921.
1922	XI	The Indian Income-tax Act, 1922.
1922	XII	The Indian Finance Act, 1922.
1922	..	The Indian States (Protection against Disaffection) Act, 1922.

THE FIRST SCHEDULE — *contd.*

Year.	Number.	Short Title.
1923	IV	The Indian Mines Act, 1923.
1923	V	The Indian Boilers Act, 1923.
1923	VIII	The Workmen's Compensation Act, 1923.
1923	XXIII	The Legal Practitioners (Women) Act, 1923.
1924	VI	The Criminal Tribes Act, 1924.
1925	XXXIX	The Indian Succession Act, 1925.
1926	XI	The Promissory Notes (Stamp) Act, 1926.
1926	XVI	The Indian Trade Unions Act, 1926.
1926	XXI	The Legal Practitioners (Fees) Act, 1926.
1926	XXXVIII	The Indian Bar Councils Act, 1926.
1929	VII	The Trade Disputes Act, 1929.
1929	XIX	The Child Marriage Restraint Act, 1929.
1930	II	The Dangerous Drugs Act, 1930.
1930	III	The Indian Sale of Goods Act, 1930.
1930	XVIII	The Silver (Excise Duty) Act, 1930.
1930	XIX	The Indian Companies (Amendment) Act, 1930.
1930	XXIV	The Indian Lac Cess Act, 1930.
1931	..	The Indian Finance Act, 1931.
1931	..	The Indian Finance (Supplementary and Extending) Act, 1931.
1931	XVI	The Provisional Collection of Taxes Act, 1931.
1931	XXIII	The Indian Press (Emergency Powers) Act, 1931.
1932	IX	The Indian Partnership Act, 1932.
1932	XI	The Public Suits Validation Act, 1932.
1932	XII	The Foreign Relations Act, 1932.
1932	XIII	The Sugar Industry (Protection) Act, 1932.
1932	XXIII	The Criminal Law Amendment Act, 1932.
1933	II	The Children (Pledging of Labour) Act, 1933.
1933	VII	The Indian Finance Act, 1933.
1933	XVII	The Indian Wireless Telegraphy Act, 1933.
1933	XXVII	The Indian Medical Council Act, 1933.
1934	II	The Reserve Bank of India Act, 1934.
1934	VIII	The Khaddar (Name Protection) Act, 1934.
1934	IX	The Indian Finance Act, 1934.
1934	XI	The Indian States (Protection) Act, 1934.
1934	XIV	The Sugar (Excise Duty) Act, 1934.
1934	XVI	The Matches (Excise Duty) Act, 1934.
1934	XX	The Indian Carriage by Air Act, 1934.
1934	XXII	The Indian Aircraft Act, 1934.
1934	XXIII	The Mechanical Lighters (Excise Duty) Act, 1934.

Year.	Number.	Short Title.
1934	XXV	The Factories Act, 1934.
1934	XXXI	The Iron and Steel Duties Act, 1934.
1934	XXXII	The Indian Tariff Act, 1934.
1935	..	The Indian Finance Act, 1935.
1936	..	The Indian Finance Act, 1936.
1936	III	The Parsi Marriage and Divorce Act, 1936.
1936	IV	The Payment of Wages Act, 1936.
1936	XIV	The Geneva Convention Implementing Act, 1936.
1937	I	The Agricultural Produce (Grading and Marking) Act, 1937.
1937	VI	The Arbitration (Protocol and Convention) Act, 1937.
1937	..	The Indian Finance Act, 1937.

THE SECOND SCHEDULE.

[See sections 2 (1) and 3.]

Acts partially extended to Berar.

Year.	Number.	Short Title.
1843	V	The Indian Slavery Act, 1843.
1850	XII	The Public Accountants' Default Act, 1850.
1850	XXXVII	The Public Servants (Inquiries) Act, 1850.
1855	XXIV	The Penal Servitude Act, 1855.
1870	VII	The Court-fees Act, 1870.
1871	XXIII	The Pensions Act, 1871.
1881	XI	The Municipal Taxation Act, 1881.
1882	IV	The Transfer of Property Act, 1882.
1885	XIII	The Indian Telegraph Act, 1885.
1886	VI	The Births, Deaths and Marriages Registration Act, 1886.
1886	XI	The Indian Tramways Act, 1886.
1890	I	The Revenue Recovery Act, 1890.
1890	VI	The Charitable Endowments Act, 1890.
1890	IX	The Indian Railways Act, 1890.
1895	XV	The Crown Grants Act, 1895.
1897	III	The Epidemic Diseases Act, 1897.
1897	X	The General Clauses Act, 1897.
1897	XIV	The Indian Short Titles Act, 1897.
1898	VI	The Indian Post Office Act, 1898.
1899	II	The Indian Stamp Act, 1899.
1899	IV	The Government Buildings Act, 1899.
1918	VII	The Indian Companies Act, 1918.
1914	IX	The Local Authorities Loans Act, 1914.
1916	XV	The Hindu Disposition of Property Act, 1916.
1917	V	The Destruction of Records Act, 1917.
1918	II	The Cinematograph Act, 1918.
1920	X	The Indian Securities Act, 1920.
1920	XXXIX	The Indian Elections Offences and Inquiries Act, 1920.

THE SECOND SCHEDULE — *concl'd.*

Year.	Number.	Short title.
1923	III	The Cotton Transport Act, 1923.
1923	XIX	The Indian Official Secrets Act, 1923.
1924	XIII	The Indian (Specified Instruments) Stamp Act, 1924.
1925	IV	The Indian Soldiers (Litigation) Act, 1925.
1925	XII	The Cotton Ginning and Pressing Factories Act, 1925.
1925	XIX	The Provident Funds Act, 1925.
1927	XVI	The Indian Forest Act, 1927.
1928	XII	The Hindu Inheritance (Removal of Disabilities) Act, 1928.
1929	II	The Hindu Law of Inheritance (Amendment) Act, 1929.
1930	XXX	The Hindu Gains of Learning Act, 1930.
1936	V	The Decrees and Orders Validating Act, 1936.

THE THIRD SCHEDULE.

[See section 2 (2).]

Acts Amended.

Name of Act.	Amendments.
The Code of Civil Procedure, 1908 (Act V of 1908).	In section 7 and in rule 1 of Order L in the First Schedule,— (a) after the figures "1887" the words and figures "or under the Berar Small Cause Courts Law, 1905" shall be inserted, and (b) for the words "under that Act" the words "under the said Act or Law" shall be substituted.
The Indian Limitation Act, 1908 (IX of 1908).	In Article 161 of the First Schedule, the word "Provincial," in both places where it occurs, shall be omitted, and after the words "Small Causes," where they occur for the first time, the brackets and words "(other than a Presidency Small Cause Court)" shall be inserted.

THE FOURTH SCHEDULE.

(See section 4.)

Acts which have ceased to have effect and are repealed in Berar.

Year.	Number.	Short title.
1841	XIX	The Succession (Property Protection) Act, 1841.
1847	XX	The Indian Copyright Act, 1847.
1860	IX	The Employers and Workmen (Disputes) Act, 1860.
1865	X	The Indian Succession Act, 1865.
1865	XXI	The Parsi Intestate Succession Act, 1865.
1881	V	The Probate and Administration Act, 1881.
1881	VI	The District Delegates Act, 1881.
1889	VII	The Succession Certificate Act, 1889.
1911	XII	The Indian Factories Act, 1911.
1912	V	The Provident Insurance Societies Act, 1912.
1912	VI	The Indian Life Assurance Companies Act, 1912.
1914	VIII	The Indian Motor Vehicles Act, 1914.
1919	X	The Excess Profits Duty Act, 1919.
1923	X	The Indian Paper Currency Act, 1923.
1926	XIX	The Indian Finance Act, 1926.
1927	V	The Indian Finance Act, 1927.
1928	XX	The Indian Insurance Companies Act, 1928.
1929	X	The Indian Census Act, 1929.
1933	XIII	The Safeguarding of Industries Act, 1933.
1935	..	The Criminal Law Amendment Act, 1935.
1936	I	The Italian Loans and Credits Prohibition Act, 1936.

ACT No. V OF 1941.

The Assam Rifles Act, 1941.

[Recd. G. G.'s assent on 17th March 1941.]

An Act to provide for the regulation of and the maintenance of discipline in the Assam Rifles.

WHEREAS it is expedient to provide for the regulation of and the maintenance of discipline in the Assam Rifles;

It is hereby enacted as follows:—

Notes.—The Assam Rifles which is a Civil Irregular Force was upto this time regulated by the Assam Rifles Act, 1920, an Act of Local Legislature. On the inauguration of the 1937 constitution, it was adopted as provincial Act on the

assumption that Assam Rifles were a military or Armed Police Force maintained by the Provincial Government and therefore included in entry 8 in list 2 of the 7th Schedule of the Government of India Act, 1935. Since 1st April 1937 the financial arrangements are that the whole cost of the force is shown initially in the tribal area budget of the External Affairs Department with a recovery from the Province of Assam of a portion of the cost. But this arrangement was found to be anomalous.

in practice. It was therefore decided that the force was classifiable as "an armed force raised in India by the Crown" under entry 1 in the Federal Legislative List. The present Act now provides for the enrollment, maintenance and discipline of the force as a central force. The Act is in main a re-enactment of the old Provincial Act.

Short title, extent and application. 1. (1) This Act may be called the Assam Rifles Act, 1941.

(2) It extends to the whole of Assam and applies to all members of the Assam Rifles wherever they may be serving.

2. In this Act, unless there is anything repugnant in the subject or context,—

(1) "active service" means service at outposts, or against hostile tribes or other persons in the field;

(2) "Commandant" or "Assistant Commandant" means a person appointed by the Central Government to be a Commandant or an Assistant Commandant of the Assam Rifles;

(3) "District Magistrate" includes a Deputy Commissioner, the Superintendent of the Lushai Hills, the Political Agent in Manipur and the Political Officer of the Sadiya and of the Balipara Frontier Tracts;

(4) "rifleman" means a person appointed as such under section 4 after he has signed the statement in the Schedule in accordance with the provisions of sub-section (2) of section 4, and includes a rifleman appointed under the Assam Rifles Act, 1920, and a Military Police Officer appointed under the Eastern Bengal and Assam Military Police Act, 1912;

(5) "superior officer" means, in relation to any rifleman,—

(a) an officer of a higher class than, or of a higher grade in the same class as, himself, and

(b) any Assistant Commandant or Commandant;

(6) the expressions "reason to believe," "criminal force," "assault," "fraudulently" and "voluntarily causing hurt" have the meanings assigned to them respectively in the Indian Penal Code.

3. General superintendence and control of the Assam Rifles shall be exercised by such person or authority as the Central Government may appoint in this behalf, and, in the exercise of such superintendence and control, the person or authority so appointed shall be governed by such rules and orders as the Central Government may make in this behalf.

4. (1) The appointment of all riflemen shall rest with the Commandant.

(2) Before any person is appointed to be a rifleman, the statement in the Schedule shall be read and if necessary explained to him in the presence of a Magistrate, Commandant or Assistant Commandant, and shall be signed by him in acknowledgment of its having been so read to him.

(3) A rifleman shall not be entitled to be discharged except in accordance with the terms of the statement which he has signed under this Act or under the Assam Rifles Act, 1920.

5. There may be all or any of the following classes of riflemen, who shall take rank in the order mentioned, namely :—

- (i) Subadars-Major,
- (ii) Subadars,
- (iii) Jemadars,
- (iv) Havildars-Major,
- (v) Havildars,
- (vi) Naiks,
- (vii) Buglers and riflemen,

and such grades in each class as the Central Government may from time to time direct,

Heinous offences. 6. A rifleman who —

(a) begins, excites, causes or joins in any mutiny or being present at any mutiny does not use his utmost endeavours to suppress it, or knowing or having reason to believe in the existence of any mutiny does not without delay give information thereof to his Commanding or other superior officer; or

(b) uses, or attempts to use, criminal force to, or commits an assault on, his superior officer, knowing or having reason to believe him to be such, whether on or off duty; or

(c) shamefully abandons or delivers up any garrison, fortress, post or guard, which is committed to his charge or which it is his duty to defend; or

(d) in the presence of an enemy or of any person in arms against whom it is his duty to act, shamefully casts away his arms or his ammunition, or intentionally uses words or any other means to induce any other rifleman to abstain from acting against the enemy, or to discourage any other rifleman from acting against the enemy; or

(e) directly or indirectly holds correspondence with, or communicates intelligence to, or assists or relieves any person in arms against the State, or omits to discover immediately to his Commanding or other superior officer any such correspondence or communications coming to his knowledge; or

(f) directly or indirectly assists or relieves with money, victuals or ammunition, or knowingly harbours or protects, any enemy or person in arms against the State; or who, while on active service,—

(g) disobeys the lawful command of his superior officer; or

(h) deserts or attempts to desert the service; or

(i) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave; or

(j) leaves his Commanding Officer, or his post or party, to go in search of plunder; or

(k) quits his guard, picquet, party or patrol without being regularly relieved or without leave; or

(l) uses criminal force to, or commits an assault on, any person bringing provisions or other necessaries to camp or quarters, or forces a safeguard, or breaks into any house or any other place for plunder, or plunders, destroys or damages any property of any kind; or

(m) intentionally causes or spreads a false alarm in action or in camp, garrison or quarters;

shall be punished with transportation for life, or with imprisonment which may extend to fourteen years, or with fine which may extend to five hundred rupees, or with both such imprisonment and fine.

Other offences including acts prejudicial to good order and discipline.

7. A rifleman who—

(a) is in a state of intoxication when on or detailed for any duty, or on parade, or on the line of march; or

(b) strikes, or forces or attempts to force, any sentry; or

(c) being in command of a guard, picquet or patrol, refuses to receive any prisoner duly committed to his charge, or, whether in such command or not, releases any prisoner without proper authority or negligently suffers any prisoner to escape; or

(d) being deputed to any guard, picquet or patrol, quits it without being regularly relieved or without leave; or

(e) being in command of a guard, picquet or patrol, permits gambling or other behaviour prejudicial to good order and discipline; or

(f) being under arrest or in confinement, leaves his arrest or confinement before he is set at liberty by proper authority; or

(g) is grossly insubordinate or insolent

to his superior officer in the execution of his office; or

(h) refuses to superintend or assist in the making of any field work or other military work of any description ordered to be made either in quarters or in the field; or

(i) strikes or otherwise ill-uses any rifleman subordinate to him in rank or position; or

(j) being in command at any post or on the march and receiving a complaint that anyone under his command has beaten or otherwise maltreated or oppressed any person, or has committed any riot or trespass, fails, on proof of the truth of the complaint, to have due reparation made as far as possible to the injured person and to report the case to the proper authority; or

(k) designedly or through neglect injures or loses or fraudulently or without due authority disposes of his arms, clothes, tools, equipment, ammunition, accoutrements or other necessaries, or any such articles entrusted to him or belonging to any other person; or

(l) malingers, feigns or produces disease or infirmity in himself, or intentionally delays his cure, or aggravates his disease or infirmity; or

(m) with intent to render himself or any other person unfit for service, voluntarily causes hurt to himself or any other person; or

(n) commits extortion, or without proper authority exacts from any person carriage, portage, or provisions; or

(o) designedly or through neglect kills, injures, makes away with, ill-treats or loses his horse, or any animal used in the public service;

or who, while not on active service,—

(p) disobeys the lawful command of his superior officer; or

(q) plunders, destroys or damages any property of any kind; or

(r) being a sentry, sleeps upon his post, or quits it without being regularly relieved or without leave; or

(s) deserts or attempts to desert the service; or

(t) neglects to obey any battalion or other orders, or commits any act or omission prejudicial to good order and discipline, such act or omission not constituting an offence under the Indian Penal Code or other Act in force in Assam, shall be punished with imprisonment for a term which may extend to one year, or

with fine which may extend to two hundred rupees, or with both.

8. (1) A District Magistrate or a Commandant, or subject to the control of the Commandant, an Assistant Commandant, or subject to the control of the Commandant an officer not below the rank of a Jemadar commanding a separate detachment or an outpost or in temporary command at the headquarters of a District during the absence of the District Magistrate, Commandant and Assistant Commandant, may, without a formal trial, award to any rifleman below the rank of a Naik, who is subject to his authority, any of the following punishments for the commission of any petty offence against discipline, which is not otherwise provided for in this Act, or which is not of a sufficiently serious nature to call for prosecution before a criminal Court, that is to say,—

(a) imprisonment in the Quarter Guard, or such other place as may be considered suitable, for a term which may extend to twenty-eight days when the order is passed by a District Magistrate or a Commandant or to seven days when it is passed by any other officer ;

(b) punishment drill, extra guard, fatigue or other duty, not exceeding twenty-eight days in duration, with or without confinement to lines ;

(c) forfeiture of pay and allowances for a period not exceeding twenty-eight days.

(2) Any of the punishments specified in sub-section (1) may be awarded separately or in combination with any one or more of the others, but no award or awards including imprisonment and confinement to lines shall exceed twenty-eight consecutive days.

9. Any rifleman sentenced under this Act to imprisonment for a period not exceeding three months shall, when he is also dismissed from the Assam Rifles, be imprisoned in a civil jail, but when he is not also dismissed from the Assam Rifles he may, if the convicting Court or the District Magistrate so directs, be confined in the Quarter Guard or such other place as the Court or Magistrate may consider suitable.

10. A Commandant or Assistant Commandant shall be entitled to all the privileges which a police officer has under sections 42 and 43 of the Police Act, 1861, section 125 of

the Indian Evidence Act, 1872, and any other enactment for the time being in force.

11. For the purposes of sections 128, 130 and 131 of the Code of Criminal Procedure, 1898, a Commandant, Assistant Commandant, Subadar-Major, Subadar or Jemadar of the Assam Rifles shall be deemed to be an officer, a Havildar-Major, Havildar or Naik shall be deemed to be a non-commissioned officer and a bugler or rifleman shall be deemed to be a soldier of His Majesty's Army.

Notes.—This section is adopted from S. 32 of the Auxiliary Force Act to define the legal position of the Assam Rifles as a central force not forming part of His Majesty's Military forces in matters dealt with by Chap. IX of the Criminal Procedure Code.

12. The Central Government may, as regards the Assam Rifles, make such orders and rules consistent with this Act, as it thinks expedient, relative to the several matters respecting which the Inspector-General of Police, with the approval of the Provincial Government, may, as regards the Police Force, frame orders and rules under section 12 of the Police Act, V of 1861.

13. The Assam Rifles Act, 1920, shall cease to apply to the Assam Rifles and to riflemen, and all riflemen shall, on the commencement of this Act, cease to be police officers under the Police Act, V of 1861.

THE SCHEDULE.

STATEMENT.

[See sections 2 (4) and 4 (2).]

1. After you have served for four years in the first instance in the Assam Rifles you have the option of extending the term of your service in the Assam Rifles indefinitely, so long as the Commandant is satisfied with your services, or of claiming your discharge at any time, making your application through the officer to whom you may be subordinate, to a Commandant of the Assam Rifles or to the Magistrate of the District in which you may be serving; and you will be granted your discharge after two months from the date of your application, unless you are on active service or unless your discharge would cause the

vacancies in the Assam Rifles to exceed one-tenth of the sanctioned strength. In either of the above cases you must continue to serve in the Assam Rifles until the objection is waived by competent authority or removed.

2. On your enlistment, appointment or training as a musician (piper, drummer, or bandsman), bugler, signaller, writer, soldier-clerk, havildar, compounder or as an artificer (armourer, mochi, carpenter, stone-mason, or motor driver) you must, in spite of the provisions of paragraph 1 above, serve in the Assam Rifles for eight years from the date of your enlistment or the completion of your training, as the case may be.

3. On your deputation for a specialist course at an Army Training Centre you must sign an undertaking, before leaving the battalion to proceed on the course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the four years following your attendance at the Army Training Course.

4. On your deputation to the Educational or Veterinary Course you must sign

an undertaking, before leaving the battalion to proceed on the Course, that you will not, in spite of the provisions of paragraph 1 above, apply for discharge during the eight years following your attendance at the Course.

5. In the event of your re-enlistment after you have been discharged, you will have no claim to reckon for pension or any other purpose your service previous to your discharge.

Signature of rifleman in acknowledgment of the above having been read to him

.....
A. B.

Signed in my presence after I had ascertained that A. B. understood the purport of what he signed.

.....
C. D.

Magistrate, Commandant or Assistant Commandant.

ACT NO. VI OF 1941.

The Indian Railways (Amendment) Act, 1941.

[Recd. G. G.'s assent on 17th March 1941.]

An Act further to amend the Indian Railways Act, 1890.

WHEREAS it is expedient further to amend the Indian Railways Act, 1890, for the purposes hereinafter appearing;

It is hereby enacted as follows:—

Notes.—Experience has shown that the provisions of the Indian Railways Act relating to ticketless travellers are insufficiently deterrent. The object of this Amending Act is to remedy this defect by providing more appropriate penalties. (See Statement of Objects and Reasons.)

1. This Act may be called the Indian Railways (Amendment) Act, 1941.

2. (1) Section 68 of the Indian Railways Act, 1890 (hereinafter referred to as the said Act), shall be re-numbered as sub-section (1) of that section and in the said section as so re-numbered after the word "enter" the words "or remain in" shall be inserted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added, namely:

"(2) A railway servant when granting

the permission referred to in sub-section (1) shall ordinarily, if empowered in this behalf by the railway administration, grant to the passenger a certificate that the passenger has been permitted to travel in such carriage upon condition that he subsequently pays the fare payable for the distance to be travelled."

Notes.—Sub-section (2) was added on the recommendation of the Select Committee.

3. (1) Section 112 of the said Act shall be re-numbered as sub-section (1) of that section and in the sub-section as so re-numbered—

(a) in clause (a), for the words and figures "in contravention of section 68 any carriage on a railway" the words and figures "or remains in any carriage on a railway in contravention of section 68" shall be substituted; and

(b) after the words "shall be punished" the words "with imprisonment for a term which may extend to three months or" shall be inserted.

(2) To the said section as so re-numbered and amended the following sub-section shall be added, namely :—

"(2) Notwithstanding anything contained in section 65 of the Indian Penal Code, the Court, convicting an offender under this section may direct that the offender in default of payment of any fine inflicted by the Court, shall suffer imprisonment for a term which may extend to three months."

Amendment of section 113, Act IX of 1890.

4. In section 113 of the said Act,—

(a) for sub-section (3) the following sub-section shall be substituted, namely :—

"(3) The excess charge referred to in sub-section (1) and sub-section (2) shall be a sum equivalent to the amount otherwise payable under those sub-sections, or eight annas, whichever is greater :

Provided that where the passenger has immediately after incurring the charge and before being detected by a railway servant notified to the railway servant on duty with the train the fact of the charge having been incurred, the excess charge shall be one-sixth of the excess charge otherwise payable calculated to the nearest anna, or two annas, whichever is greater :

Provided further that if the passenger has with him a certificate granted under sub-section (2) of section 68, no excess charge shall be payable";

(b) in sub-section (4), for the words beginning with "the sum payable by him shall" and ending with "be paid to the railway administration" the following words shall be substituted, namely :—

"any railway servant appointed by the railway administration in this behalf may apply to any Magistrate of the first or second class for the recovery of the sum payable as if it were a fine, and the Magistrate if satisfied that the sum is payable shall order

it to be so recovered, and may order that the person liable for the payment shall in default of payment suffer imprisonment of either description for a term which may extend to one month. Any sum recovered under this sub-section shall, as it is recovered, be paid to the railway administration."

Insertion of new section 113A in Act IX of 1890.

5. After section 113 of the said Act the following section shall be inserted, namely :—

"113A. Any person who, without having obtained the permission of a railway servant, travels or attempts to travel in a carriage without having a proper pass or ticket with him, or in a carriage of a higher class than that for which he has obtained a pass or purchased a ticket, or in a carriage beyond the place authorized by his pass or ticket, or who being in a carriage fails or refuses to present for examination or to deliver up his pass or ticket immediately on requisition being made therefor under section 69, may be removed from the carriage by any railway servant authorized by the railway administration in this behalf or by any other person whom such railway servant may call to his aid, unless he then and there pays the fare and the excess charge which he is liable to pay under section 113:

Provided that nothing in this section shall be deemed to preclude a person removed from a carriage of a higher class from continuing his journey in a carriage of a class for which he holds a pass or ticket :

Provided further that women and children, if unaccompanied by male passengers shall not be so removed except either at the station at which they first enter the train or at a junction or terminal station or station at the headquarters of a civil district and only between the hours of 6 A.M. and 6 P.M."

ACT No. VII OF 1941.

The Indian Finance Act, 1941.

[Recd. G. G.'s assent on 31st March 1941.]

An Act to fix the duty on salt manufactured in, or imported by land into, certain parts of British India, to vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged.

WHEREAS it is expedient to fix the duty on salt manufactured in, or imported by and into, certain parts of British India, to

vary the rate of the excise duty on matches leviable under the Matches (Excise Duty) Act, 1934, to vary the rate of the excise duty

on mechanical lighters leviable under the Mechanical Lighters (Excise Duty) Act, 1934, to vary the rate of the duty on artificial silk yarn and thread leviable under the Indian Tariff Act, 1934, to fix maximum rates of postage under the Indian Post Office Act, 1898, to fix rates of income-tax and super-tax and to continue the charge and levy of excess profits tax and fix the rate at which excess profits tax shall be charged ;

It is hereby enacted as follows :—

Notes.—The object of the Act is to continue for a further period of one year the existing rate of salt duty, the present inland postage rates and the present rates of income-tax and super-tax, to increase the rates of duty on matches, mechanical lighters, artificial silk yarn and thread, to increase the central surcharge on taxes on income to 33½ per cent. and to fix the rate of excess profits tax at 66½ per cent.

Short title and extent. 1. (1) This Act may be called the Indian Finance Act, 1941.

(2) It extends to the whole of British India.

2. The provisions of section 7 of the Indian Salt Act, 1882, shall, in so far as they enable the Central Government to impose by rule made under that section a duty on salt manufactured in, or imported into, any part of British India, be construed as if, for the year beginning on the 1st day of April, 1941, they imposed such duty at the rate of one rupee and four annas per maund of eighty-two and two-sevenths pounds avoirdupois of salt manufactured in, or imported by land into, any such part, and such duty shall, for all the purposes of the said Act, be deemed to have been imposed by rule made under that section.

3. For section 4 of the Matches (Excise Duty) Act, 1934, the following section shall be substituted, namely :—

"4. The duty payable under section 3 shall be levied at the following rates, namely :—

(a) on matches in boxes or booklets containing on an average not more than eighty—

(i) if the average number is forty or less, at the rate of two rupees per gross of boxes or booklets,

(ii) if the average number is more than forty, but not more than sixty, at the rate of three rupees per gross of boxes or booklets, and

(iii) if the average number is more than sixty, at the rate of four rupees per gross of boxes or booklets ;

(b) on all other matches, at such rate as the Central Government may prescribe."

4. In section 3 of the Mechanical Lighters (Excise Duty) Act, 1934, for the words "one rupee and eight annas" the words "three rupees" shall be substituted.

5. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 47 (2), for the entry "25 per cent. *ad valorem* or 3 annas per lb., whichever is higher" in the fourth column the following entry shall be substituted, namely :—
"25 per cent. *ad valorem* or 5 annas per lb., whichever is higher."

6. For the year beginning on the 1st day of April 1941, the Schedule contained in the Schedule to this Act shall be inserted in the Indian Post Office Act, 1898, as the First Schedule to that Act.

Income-tax and Super-tax. 7. (1) Subject to the provisions of sub-sections (2) and (3) —

(a) income-tax for the year beginning on the 1st day of April 1941, shall be charged at the rates specified in Part I of Schedule II to the Indian Finance Act, 1939, increased in each case by a surcharge for the purposes of the Central Government amounting to one-third of each such rate ;

(b) rates of super-tax for the year beginning on the 1st day of April 1941, shall, for the purposes of section 55 of the Indian Income-tax Act, 1922, be the rates specified in Part II of Schedule II to the Indian Finance Act, 1939, increased —

(i) in the case of the rate applicable to a company, by a surcharge amounting to one-third of that rate, and

(ii) in the case of every other rate, by a surcharge for the purposes of the Central Government amounting to one-third of each such rate ;

Provided that in the case of an association of persons being a co-operative society, other than the Sanikatta Saltowners' Society in the Bombay Presidency, for the time being registered under the Co-operative Societies Act, 1912, or under an Act of the Provincial Legislature governing the registration of Co-operative Societies, the rates of super-tax for the year beginning on the 1st day of April 1941, shall be the rates of super-tax specified in the proviso to clause (b) of sub-section (1) of section 7 of the Indian Finance Act, 1940, increased in each case by

For every additional five tolas, or fraction thereof, in excess of ten tolas Quarter of an anna.
 Provided that such packet shall not be delivered at any addressee's residence but shall be given to a recognized agent at the Post Office.

Parcels.

For a weight not exceeding forty tolas Four annas.
 For every forty tolas, or fraction thereof, exceeding forty tolas Four annas."

ACT NO. VIII OF 1941.**Protective Duties Continuation Act, 1941.**

[Recd. G. G.'s assent on 31st March 1941.]

An Act to extend the date up to which certain duties characterized as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect.

WHEREAS it is expedient to extend the date up to which certain duties characterized as protective in the First Schedule to the Indian Tariff Act, 1934, shall have effect;

It is hereby enacted as follows:—

1. This Act may be called the Protective Duties Continuation Act, 1941.
Short title.

2. In the First Schedule to the Indian Tariff Act, 1934, in Item No. 17, and in Item No. 61 (5), and in Items Nos. 63 (2), 63 (3), 63 (6), 63 (9), 63 (10), 63 (12), 63 (15), 63 (17), 63 (19), 63 (20), 63 (21), 63 (25) and

63 (27), and in Item No. 74, for the entry or entries in the seventh column "March 31st, 1941" the entry or entries "March 31st, 1942" shall be substituted.

3. In section 3 of the Sugar Industry Amendment of (Protection) Act, 1932, section 3, Act XIII for the figure "1941" the figure "1942" shall be substituted.

Notes.—The existing protective duties on iron and steel manufactures, silver thread and wire and sugar have been extended by this Act for one year more as under the present conditions it was found impossible to ascertain the quantum of protection, if any, required during normal years for the articles.

ACT NO. IX OF 1941.**The Indian Tariff (Amendment) Act, 1941.**

[Recd. G. G.'s assent on 31st March 1941.]

An Act further to amend the Indian Tariff Act, 1934.

WHEREAS it is expedient further to amend the Indian Tariff Act, 1934, for the purpose hereinafter appearing;

It is hereby enacted as follows:—

1. This Act may be called the Indian Tariff (Amendment) Act, 1941.
Short title.

2. In the First Schedule to the Indian Tariff Act, 1934, in Items Nos. 10 (1) and 11 (1), in the last column, for the

figure "1941" the figure "1942" shall be substituted.

Notes.—The existing import duties on wheat and wheat flour have been extended by this Act for a further period of one year as the Government of India, were, after having maintained a careful watch on the prices, satisfied that taking all the circumstances into consideration it was desirable to do so.

ACT NO. X OF 1941.**Tyres (Excise Duty), Act, 1941.**

[Recd. G. G.'s assent on 31st March 1941.]

An Act to provide for the imposition and collection of an excise duty on tyres.

WHEREAS it is expedient to provide for the imposition and collection of an excise duty on tyres;

It is hereby enacted as follows:—

Notes.—The object of this Act is to impose an excise duty of ten per cent. *ad valorem* on pneumatic rubber tyres and tubes.

Short title and extent. 1. (1) This Act may be called the Tyres (Excise Duty) Act, 1941.

(2) It extends to the whole of British India.

2. In this Act, unless there is anything repugnant in the subject or context,—

Definitions.

(a) "manufactory" means any premises wherein tyres are manufactured ;

(b) "owner" includes any person expressly or impliedly authorised by an owner of a manufactory to be his agent in respect of the manufactory ;

(c) "tyre" means a pneumatic tyre in the manufacture of which rubber is used, and includes the inner tube and the outer cover of such a tyre.

3. (1) A duty of excise at the rate of ten per cent. on the value thereof shall be levied on all tyres manufactured in any manufactory in British India and issued out of such manufactory on or after the 1st day of April 1941, and shall be payable by the owner of the manufactory.

(2) For the purposes of levying the duty imposed by sub-section (1) the Central Government may, by notification in the official Gazette, fix the values of tyres or of any class of tyres ; and where no such value has been fixed the value of a tyre shall be deemed to be the wholesale cash price, less trade discount, for which a tyre of the like kind and quality is sold or is capable of being sold by a manufactory without any abatement or deduction whatever except the amount of the excise duty payable on it at the time of issue out of the manufactory.

4. (1) If any duty payable under section 3 is not paid within the time fixed by a notice issued in accordance with any rules made in this behalf under this Act, it shall be deemed to be an arrear, and the authority to which such duty is payable may, in lieu thereof, recover any sum not exceeding double the amount of the duty unpaid, which such authority may in its discretion think it reasonable to require.

(2) An arrear of duty, or any sum recoverable in lieu thereof under this section, shall be recoverable as an arrear of land-revenue and shall be recoverable in addition to, and not in substitution for, any other penalty incurred under this Act.

5. (1) No person shall issue any tyres out of any manufactory except in accordance with the provisions of rules made under section 8 regulating such issue, or, until such rules are made, in accordance with the general or special orders of the Central Government.

(2) Whoever contravenes any such rule or order shall be punishable with fine which may extend to one thousand rupees or to a sum double the amount of the duty on any tyres issued in contravention of such rule or order, whichever is greater.

6. The Central Government may, by notification in the official Gazette, declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy of and exemption from customs duties, drawback of duty, warehousing, offences and penalties, confiscation and procedure relating to offences and appeals shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duty imposed by sub-section (1) of section 3.

7. The Central Government may, by notification in the official Gazette, prohibit import absolutely, or with such exceptions as it thinks fit, the bringing of tyres into British India from the territory of any specified Indian State.

8. (1) The Central Government may, by notification in the official Gazette, make rules—

(a) imposing on owners of manufactories the duty of furnishing returns and keeping records and books, and prescribing the form of such returns, records and books and the particulars to be contained therein, and the manner in which the same are to be verified ;

(b) regulating the issue of tyres out of manufactories ;

(c) providing for the assessment and collection of the duty, the issue of notices requiring payment, the authority to whom the duty shall be payable and the recovery of arrears ;

(d) authorising and providing for the inspection of manufactories ; and

(e) generally for carrying into effect the provisions of this Act.

(2) Such rules may provide that any breach thereof shall be punishable with fine which may extend to five hundred rupees :

Provided that the breach of any rule made under clause (b) of sub-section (1) shall be punishable with the punishment provided for an offence against section 5.

Excess Profits Tax (Amendment) Act, 1941.

[Recd. G. G.'s assent on 31st March 1941.]

An Act further to amend the Excess Profits Tax Act, 1940.

WHEREAS it is expedient further to amend the Excess Profits Tax Act, 1940, for the purposes hereinafter appearing ;

It is hereby enacted as follows :—

Notes.—The main object of this Act is to provide for the consequences of a change in the period of charge and the rate of the excess profits tax.

1. This Act may be called the Excess Profits Tax (Amendment) Act, 1941.
Short title.

2. In section 2 of the Excess Profits Tax Act, 1940, (hereinafter referred to as the said Act), after clause (16) the following clause shall be inserted, namely :—

“(16A) “ordinary share capital” has the meaning assigned to that expression in sub-section (8) of section 9 ;”.

3. Section 4 of the said Act shall be re-numbered as sub-section (1) of that section, and to the section as so re-numbered the following sub-section shall be added, namely :—

“(2) Where a chargeable accounting period falls partly before and partly after the end of March, 1941, the foregoing provisions of this section shall apply as if so much of that chargeable accounting period as falls before, and so much of that chargeable accounting period as falls after, the said end of March were each a separate chargeable accounting period, and as if the excess of profits of that separate chargeable accounting period were an apportioned part of the excess of profits arising in the whole period ; and any apportionment required to be made by this sub-section shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period.”

Notes.—The new sub-section (2) provides for the charge of the tax at the original and increased rates, respectively for the parts of a chargeable accounting period falling before and after the end of March 1941.

4. To section 7 of the said Act the following provisos shall be added, namely :—

“Provided that a deficiency of profits occurring in a chargeable accounting period beginning on or after the 1st day of April,

1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period beginning on or after the said 1st day of April, and a deficiency of profits occurring in a chargeable accounting period ending on or before the 31st day of March, 1941, shall first be applied so as to reduce profits chargeable to tax arising in another chargeable accounting period ending on or before the said 31st day of March ; and where owing to an insufficiency of profits for chargeable accounting periods ending on or before the said 31st day of March, or, as the case may be, beginning on or after the said 1st day of April, the whole or any part of the deficiency is applied otherwise than as aforesaid,—

(a) the application shall be treated as provisional only ; and

(b) if it thereafter appears that there is no longer such an insufficiency as aforesaid, such adjustment shall be made as the Central Board of Revenue may by written order direct :

Provided further that where a chargeable accounting period falls partly before and partly after the end of March, 1941, the provisions of the preceding proviso shall apply as if so much of the chargeable accounting period as falls before, and so much of the chargeable accounting period as falls after, the said end of March, were each a separate chargeable accounting period, and as if the deficiency of profits of that separate chargeable accounting period were an apportioned part of the deficiency of profits occurring in the whole period ; and any apportionment required to be made by this proviso shall be made by reference to the number of months or fractions of months in each of the parts of the whole chargeable accounting period.”

5. In sub-section (1) of section 17 of the said Act,—

(a) in the first proviso, for the words “first proviso” the words “second proviso” shall be substituted ;

(b) in the second proviso, for the word “modifications” the following words shall be substituted, namely :—

“refusal to make modifications or against any modifications.”

6. In the first proviso to rule 1 of the *Amendment of rule 1, First Schedule, Act XV of 1940.* First Schedule to the said Act, after the words "Provided that

any sums" the brackets and words "(other than any interest paid by a firm to a partner of the firm)" shall be inserted and shall be deemed always to have been inserted.

ACT NO. XII OF 1941

Delhi Restriction of Uses of Land Act, 1941.

[Recd. G. G.'s assent on 8th April 1941.]

An Act to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes.

WHEREAS it is expedient to regulate in the Province of Delhi the use of land for purposes other than agricultural purposes;

It is hereby enacted as follows:—

*Notes:—*As, up-till now there was no legal power to control the development of road-side areas outside the municipal limits of New Delhi such development was threatening to become a serious obstacle to the future systematic expansion of New Delhi—an expansion which the growth of the population is certain to render inevitable in the coming years. This Act now enables the necessary control to be exercised over areas adjacent to main roads in order to prevent such problems developing in Delhi Province.

1. (1) This Act may be called the Delhi *Short title, extent and commencement.* Restriction of Uses of Land Act, 1941.

(2) It extends to the Province of Delhi.

(3) It shall come into force on such date as the Central Government may, by notification in the official Gazette, appoint.

2. In this Act, unless there is anything *Definitions.* repugnant in the subject or context,—

(1) "agriculture" includes horticulture and the planting and upkeep of orchards;

(2) "building" has the same meaning as in clause (2) of section 3 of the Punjab Municipal Act, 1911;

(3) "Chief Commissioner" means the Chief Commissioner of Delhi;

(4) "Deputy Commissioner" means the Deputy Commissioner of Delhi and includes any authority, not being an officer employed by the Delhi Improvement Trust, appointed by the Chief Commissioner, by notification in the official Gazette, to perform all or any of the functions of the Deputy Commissioner under this Act;

(5) "place of worship" includes an *imambara, dargah, karbala, or takya*;

(6) "prescribed" means prescribed by rules made under this Act;

(7) "road" means a metalled road maintained by the Central Government or by a local authority; and

(8) the expression "to erect or re-erect" in relation to any building has the same

meaning as in clause (5) of section 3 of the Punjab Municipal Act, 1911.

3. (1) The Chief Commissioner may, with *Declaration of controlled area.* of the previous sanction of the Central Government, by notification in the official Gazette, declare any land adjacent to and within a distance of four hundred and forty yards from the centre line of any road to be a controlled area for the purposes of this Act.

(2) Not less than three months before making a declaration under sub-section (1) the Chief Commissioner shall cause to be published in the official Gazette and in at least two newspapers printed in a language other than English a notification stating that he proposes, with the previous sanction of the Central Government, to make such a declaration and specifying therein the boundaries of the land in respect of which the declaration is proposed to be made, and copies of every such notification or of the substance thereof shall be published by the Deputy Commissioner in such manner as he thinks fit at his office and in every revenue estate of which any part is included within the said boundaries.

(3) Any person interested in any land included within the said boundaries may, at any time before the expiration of thirty days from the last date on which a copy of such notification is published by the Deputy Commissioner, object to the making of the declaration or to the inclusion of his land or any part of it within the said boundaries.

(4) Every objection under sub-section (3) shall be made to the Deputy Commissioner in writing, and the Deputy Commissioner shall give to every person so objecting an opportunity of being heard either in person or by pleader, and shall after all such objections have been heard and after such further enquiry, if any, as he thinks necessary, forward to the Chief Commissioner the record of the proceedings held by him together with a report setting forth his recommendations on the objections.

(5) If before the expiration of the time allowed by sub-section (3) for the filing of objections no objection has been made, the Chief Commissioner may proceed at once to the making of a declaration under sub-section (1). If any such objections have been made, the Chief Commissioner shall consider the record and the report referred to in sub-section (4) and shall hear any parties applying to be heard and may either—

(a) abandon the proposal to make a declaration under sub-section (1), or

(b) make such a declaration in respect of either the whole or a part or parts of the land included within the boundaries specified in the notification under sub-section (2).

(6) for the purposes of sub-section (3) a person shall be deemed to be interested in land if he is a "person interested" as defined in clause (b) of section 3 of the Land Acquisition Act, 1894, for the purposes of that Act or, where the land is land occupied by or for the purposes of a mosque, *imambara*, *dargah*, *karbala*, *takya* or Muslim graveyard, if he is a Muslim.

(7) A declaration made under sub-section (1) shall, unless and until it is withdrawn, be conclusive evidence of the fact that the area to which it relates is a controlled area.

4. (1) The Deputy Commissioner shall deposit at his office and at the office of the Municipal Committee, New Delhi, and at such other places as he considers necessary, plans showing all lands declared to be controlled areas for the purposes of this Act, and setting forth the nature of the restrictions applicable to the land in any such controlled area.

(2) The plans so deposited shall be available for inspection by the public free of charge at all reasonable times.

5. No person shall erect or re-erect any building, or make or extend any excavation, or lay out any means of access to a road in a controlled area except with the previous permission of the Deputy Commissioner in writing.

6. (1) Every person desiring to obtain the permission referred to in section 5 shall make an application in writing to the Deputy Commissioner in such form and containing such information in respect of the building, excavation or means of access

to which the application relates as may be prescribed.

(2) On receipt of such application the Deputy Commissioner, after making such enquiry as he considers necessary, shall, by order in writing, either—

(a) grant the permission, subject to such conditions, if any, as may be specified in the order; or

(b) refuse to grant such permission.

(3) When the Deputy Commissioner grants permission subject to conditions under clause (a) of sub-section (2) or refuses to grant permission under clause (b) of sub-section (2), the conditions imposed or the grounds of refusal shall be such as are reasonable having regard to the circumstances of each case.

(4) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building, not being a dwelling house, if such building is required for purposes subservient to agriculture, nor shall the permission to erect or re-erect any such building be made subject to any conditions other than those which may be necessary to ensure that the building will be used solely for the purposes specified in the application for permission.

(5) The Deputy Commissioner shall not refuse permission to the erection or re-erection of a building which was in existence on the date on which the declaration under sub-section (1) of section 3 was made, nor shall he impose any conditions in respect of such erection or re-erection unless it involves the addition of one or more storeys to the building or the extension of the plinth area of the building by more than one-eighth of the original plinth area, or there is a probability that the building will be used for a purpose other than that for which it was used on the date on which the said declaration was made.

(6) If at the expiration of a period of three months after an application under sub-section (1) has been made to the Deputy Commissioner no order in writing has been passed by the Deputy Commissioner permission shall be deemed to have been given without the imposition of any conditions.

(7) The Deputy Commissioner shall maintain a register with sufficient particulars of all permissions given by him under this section and the register shall be available for inspection without charge by all persons interested and such persons shall be entitled to take extracts therefrom.

7. (1) Any person aggrieved by an order of the Deputy Commissioner under sub-section (2) of section 6 granting permission subject to conditions or refusing permission may within thirty days from the date of such order prefer an appeal to the Chief Commissioner.

(2) The order of the Chief Commissioner on appeal shall be final.

8. (1) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by an order —

(a) refusing permission to make or extend an excavation, or granting such permission but imposing conditions on the grant, or

(b) refusing permission to lay out a means of access to a road, or granting such permission but imposing conditions on the grant, or

(c) granting permission to erect or re-erect a building but imposing conditions on the grant.

(2) When an order has been made refusing permission to erect or re-erect a building any person who has exercised the right of appeal given by sub-section (1) of section 7 may, within three months of the date of the order of the Chief Commissioner, make to the Chief Commissioner a claim for compensation on the ground that his interest in the land concerned is injuriously affected by the said order :

Provided that no claim for compensation may be made under this sub-section in respect of any land situated in a controlled area adjoining a road which has been constructed after the commencement of this Act or which was not at the commencement of this Act a road within the meaning of clause (4) of section 2.

(3) On receipt of a claim under sub-section (2) the Chief Commissioner shall either proceed to acquire the land concerned under the Land Acquisition Act, 1894, or transfer the claim for disposal to an officer exercising the powers of a Collector under the said Act :

Provided that in case the Chief Commissioner decides to acquire the land, the claimant shall be entitled to be repaid by the acquiring authority the amount of expense which he may have properly incurred in connexion with the preparation and submission of his claim for compensation under this section, and in default of agreement such amount shall be determined by the authority deciding the value of the land

in the proceedings under the Land Acquisition Act, 1894.

(4) Nothing in this section shall be deemed to preclude the settlement of a claim by mutual agreement.

9. If the Chief Commissioner decides to acquire the land under the Land Acquisition Act, 1894, then, notwithstanding anything contained in that Act,—

(i) proceedings under section 5A of that Act shall not be required ;

(ii) the notification under section 6 of that Act shall be published within six months from the date of institution of the claim, failing which the claim shall be transferred for disposal to an officer exercising the powers of a Collector under that Act ;

(iii) the market value of the land shall be assessed as though no declaration under section 3 (1) had been made in respect of the area in which it is situated and no restrictions upon its use and development had been imposed, any compensation already paid to the claimant or to any of his predecessors in interest for injurious affection being deducted from the market value as so assessed.

10. (1) When a claim is transferred for disposal under section 8 or section 9 to an officer exercising the powers of a Collector under the Land Acquisition Act, 1894, such officer shall make an award determining the amount of compensation, if any, payable to the claimant.

(2) The amount of compensation awarded under sub-section (1) shall in no case exceed—

(a) the amount that would have been payable if the land had been acquired under section 9, or

(b) the difference between the market value of the land in its existing condition having regard to the restrictions actually imposed upon its use and development by the order refusing permission to erect or re-erect a building thereon, and its market value immediately before the publication under sub-section (2) of section 3 of the notification in pursuance of which the area in which it is situated was declared to be a controlled area,

and no compensation shall be awarded under sub-section (1) —

(i) unless the claimant satisfies the officer making the award that proposals for the development of the land which at the date of the application under sub-section (1) of

section 6 are immediately practicable, or would have been so, if this Act had not been passed, are prevented or injuriously affected by the restrictions imposed under this Act, or

(ii) if and in so far as the land is subject to substantially similar restrictions in force under some other enactment which were so in force at the date when the restrictions were imposed under this Act; or

(iii) if compensation in respect of the same restrictions in force under this Act or of substantially similar restrictions in force under some other enactment has already been paid in respect of the land to the claimant or to any predecessor in interest of the claimant.

(3) The provisions of Parts III, IV, V and VIII of the Land Acquisition Act, 1894, shall so far as may be apply to an award made under sub-section (1) as though it were an award made under that Act.

11. Nothing in this Act shall affect the *Saving for other enactments.* power of any authority to acquire land or to impose restrictions upon the use and development of land under any other enactment for the time being in force.

12. (1) No land within a controlled area shall be used for the *Prohibition of use of any land as a brick-field, etc., without a licence.* purposes of a charcoal-kiln, pottery-kiln or lime-kiln and no land either within or outside a controlled area shall be used for the purposes of a brick-field or brick-kiln except under, and in accordance with the conditions of, a licence from the Chief Commissioner which shall be renewable annually.

(2) The Chief Commissioner may charge such fees for the grant and renewal of such licences and may impose such conditions in respect thereof as may be prescribed.

(3) No person shall be entitled to claim compensation under this or any other Act for any injury, damage or loss caused or alleged to have been caused by the refusal of a licence under sub-section (1).

Offences and penalties. 13. (1) Any person who—

(a) erects or re-erects any building or makes or extends any excavation or lays out any means of access to a road in contravention of the provisions of section 5 or in contravention of any conditions imposed by an order under section 6 or section 7, or

(b) uses any land in contravention of the provisions of sub-section (1) of section 12,

shall be punishable with fine which may extend to five hundred rupees and, in the case of a continuing contravention, with a further fine which may extend to fifty rupees for every day after the date of the first conviction during which he is proved to have persisted in the contravention.

(2) Without prejudice to the provisions of sub-section (1), the Deputy Commissioner may order any person who has committed a breach of the provisions of the said sub-section to restore to its original state or to bring into conformity with the conditions which have been violated, as the case may be, any building or land in respect of which a contravention such as is described in the said sub-section has been committed, and if such person fails to do so within three months of the order may himself take such measures as may appear to him to be necessary to give effect to the order, and the cost of such measures shall be recoverable from such person as an arrear of land-revenue.

14. No Court inferior to that of a Magistrate of the first class shall try any offence punishable under this Act.

15. No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

Savings. 16. Nothing in this Act shall apply to—

(a) the erection or re-erection of buildings upon land included in the inhabited site of any village as defined in the revenue records;

(b) the erection or re-erection of a place of worship or a tomb or cenotaph or of a wall enclosing a graveyard, place of worship, cenotaph or *samadhi* on land which is at the time a notification under sub-section (2) of section 3 is published by the Chief Commissioner occupied by or for the purposes of such place of worship, tomb, *samadhi*, cenotaph or graveyard;

(c) excavations (including wells) made in the ordinary course of agricultural operations;

(d) the construction of an unmetalled road intended to give access to land solely for agricultural purposes.

17. (1) The Chief Commissioner may *Power to make rules.* make rules to carry out the purposes of this Act.

(2) In particular and without prejudice

to the generality of the foregoing power such rules may provide for all or any of the following matters, namely :—

(a) the form in which applications under sub-section (1) of section 6 shall be made and the information to be furnished in such applications ;

(b) the regulation of the laying out of means of access to roads ;

(c) the fees to be charged for the grant and renewal of licences under section 12 and

the conditions governing such licences.

(3) All rules made under this section shall be subject to the condition of previous publication, which publication shall be made in the official Gazette and in at least two newspapers printed in a language other than English ; and the date to be specified under clause (3) of section 23 of the General Clauses Act, 1897, shall not be less than two months from the date on which the draft of the proposed rules was published.

ACT NO. XIII OF 1941.

The Insurance (Amendment) Act, 1941.

[Recd. G. G.'s assent on 8th April 1941.]

An Act further to amend the Insurance Act, 1938.

WHEREAS it is expedient further to amend the Insurance Act, 1938, for the purposes hereinafter appearing;

It is hereby enacted as follows :—

1. This Act may be called the Insurance (Amendment) Act, 1941.

Amendment of section 2, Act IV of 1938. 2. In section 2 of the Insurance Act, 1938 (hereinafter referred to as the said Act),—

(a) in clause (5), for the words "an insurer" the words "an insurer or a provident society as defined in Part III" and for the words "the insurer" the words "such insurer or provident society" shall be substituted;

(b) in clause (9), for the words "to which the provisions of Part III apply" the words "as defined in Part III" shall be substituted.

Amendment of section 3, Act IV of 1938. 3. In section 3 of the said Act,—

(a) in the proviso to sub-section (1), for the words, brackets and figures "the expiry of one month from the commencement of the Insurance (Amendment) Act, 1940" the words "such date as may be fixed in this behalf by the Central Government by notification in the official Gazette" shall be substituted;

(b) in clause (g) of sub-section (2), for the word "one" the word "five" shall be substituted;

(c) in sub-section (4), to clause (d) the word "or" shall be added, and after clause (d) the following clause and words shall be added, namely :—

"(e) if, in the case of an insurer specified in sub-clause (c) of clause (9) of section 2, the standing contract referred to in that

sub-clause is cancelled or is suspended and continues to be suspended for a period of six months,

and the Superintendent of Insurance may cancel the registration of an insurer if the insurer has failed to have the registration renewed";

(d) in sub-section (5), after the words, brackets, letter and figure "clause (a) of sub-section (4)" the words, brackets, letter and figure "clause (e) of sub-section (4), or because the insurer has failed to have the registration renewed" shall be inserted;

(e) in sub-section (5C), after the word, brackets and figure "sub-section (4)" the words, brackets, letter and figure "clause (e) of sub-section (4), or because the insurer has failed to have his registration renewed" and after the word and figures "section 98" the words, brackets, figures and letter "or has his standing contract restored or has had an application under sub-section (4) of section 3A accepted" shall be inserted.

Insertion of new section 3A in Act IV of 1938. 4. After section 3 of the said Act the following section shall be inserted, namely :—

"3A. (1) An insurer who has been granted a certificate of registration under section 8 shall have the registration renewed annually for each year after that ending on the 31st day of December, 1941.

(2) An application for the renewal of a registration for any year shall be made by the insurer to the Superintendent of Insurance before the 31st day of December of the preceding year, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed one thousand rupees for each

class of insurance business, but may vary according to the volume of business done by the insurer in India in each class of insurance business to which the registration relates.

Notes.—The words "in India" have been inserted in sub-s. (2), by the Select Committee, so as to exclude the possibility of the world income of an insurer who transacts business outside as well as within India being taken into consideration.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or, where there is no office of that Bank, into the Imperial Bank of India acting as the agent of that Bank, or into any Government Treasury, and the receipt shall be sent along with the application for renewal of the registration.

(4) If an insurer fails to apply for renewal of registration before the date specified in sub-section (2) the Superintendent of Insurance may, so long as an application to the Court under sub-section (5D) of section 3 has not been made, accept an application for renewal of the registration on receipt from the insurer of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by him, as the Superintendent of Insurance may require:

Provided that an appeal shall lie to the Central Government from an order passed by the Superintendent of Insurance imposing a penalty on the insurer.

(5) The Superintendent of Insurance shall, on fulfilment by the insurer of the requirements of this section, renew the registration and grant him a certificate of renewal of registration."

Amendment of section 4, Act IV of 1938. 5. In section 4 of the said Act,—

(a) in sub-section (1), for the words "a provident society to which Part III" the words "a provident society as defined in Part III" shall be substituted;

(b) for sub-section (2) the following sub-section shall be substituted, namely :—

"(2) Nothing contained in this section shall apply to any policy of the description known as a group policy, where the number of persons covered by the policy is not less than fifty or such smaller number as may be approved by the Superintendent of Insurance and a standard form of the policy has been certified in writing by the Superintendent of Insurance to be a policy of such description."

6. In sub-section (3) of section 5 of the said Act, for the words "to which Part III applies" the words "as de-

fined in Part III" shall be substituted.

Amendment of section 7, Act IV of 1938. 7. In sub-section (9A) of section 7 of the said Act, after clause (b) the following words shall be added, namely :—

"and may charge the normal commission on such sale or on such investment."

Amendment of section 10, Act IV of 1938. 8. In section 10 of the said Act,—

(a) to sub-section (1) the following words, brackets and letters shall be added, namely :—

"and where the insurer carries on business of the class specified in clause (d) of that sub-section whether alone or in conjunction with business of another class, he shall, unless the Superintendent of Insurance waives this requirement in writing, keep a separate account of all receipts and payments in respect of each such sub-class of the class specified in clause (d) as may be prescribed in this behalf :

Provided that no sub-class of the class of insurance business specified in clause (d) of sub-section (1) of section 7 shall be prescribed under this sub-section if the insurance business comprised in the sub-class consists of insurance contracts which are terminable by the insurer at intervals not exceeding twelve months and under which, if a claim arises, the insurer's liability to pay benefit ceases within one year of the date on which the claim arose."

Notes.—This proviso has been added to sub-s. (1) of S. 10 of the principal Act to make it clear that such classes of insurance as fire insurance and accident insurance, where the contracts do not normally extend beyond one year are not to be required to have separate accounts kept.

(b) in sub-section (2), for the words "the excess of receipts over payments in respect of such business" the following words shall be substituted, namely :—

"all receipts due in respect of such business";

(c) in sub-section (3), the words and figures "save as provided in section 49" shall be omitted, and for the words "other than those of life insurance" the words "other than those of the life insurance business of the insurer" shall be substituted.

Amendment of section 11, Act IV of 1938. 9. In section 11 of the said Act,—

(a) in clause (c) of sub-section (1),—

(i) for the words "in respect of each class of insurance business carried on by him" the words, brackets and figures "in respect of each class or sub-class of insur-

ance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments" shall be substituted; and

(ii) for the words "that class of insurance business" the words "that class or sub-class of insurance business" shall be substituted;

(b) in sub-section (2), for the words and figures "to which the Indian Companies Act, 1913, applies" the following shall be substituted, namely:—

"as defined in clause (2) of sub-section (1) of section 2 of the Indian Companies Act, 1913,".

Amendment of section 13, Act IV of 1938. 10. To section 13 of the said Act the following sub-section shall be added, namely:—

"(6) The provisions of this section relating to life insurance business shall apply also to any such sub-class of insurance business included in the class 'Miscellaneous Insurance' as may be prescribed under sub-section (1) of section 10; and the Superintendent of Insurance may authorise such modifications and variations of the regulations contained in Part I of the Fourth and Fifth Schedules and of the requirements of Part II of those Schedules as may be necessary to facilitate their application to any such sub-class of insurance business:

Provided that, if the Superintendent of Insurance is satisfied that the number and amount of the transactions carried out by an insurer in any such sub-class of insurance business is so small as to render periodic investigation and valuation unnecessary he may exempt that insurer from the operation of this sub-section in respect of that sub-class of insurance business."

Amendment of section 15, Act IV of 1938. 11. In sub-section (1) of section 15 of the said Act,—

(a) for the words "within six months" the words and figures "in the case of the accounts and statement referred to in section 11 within six months and in the case of the abstract and statement referred to in section 13 within nine months" shall be substituted;

(b) the sentence beginning with the words "The Superintendent of Insurance may extend" and ending with the words "by a period not exceeding three months" shall be omitted.

Amendment of section 16, Act IV of 1938. 12. In sub-section (2) of section 16 of the said Act,—

(a) to clause (a) the words "as at the date of any balance-sheet so furnished" shall be added;

(b) in clause (b),—

(i) for the words "for each class of insurance business carried on by him, a revenue account" the following words, brackets and figures shall be substituted, namely:—

"for each class or sub-class of insurance business for which he is required under sub-section (1) of section 10 to keep a separate account of receipts and payments, a revenue account for the period covered by any account so furnished";

(ii) for the words "that class of business" the words "that class or sub-class of insurance business" shall be substituted;

(c) for clause (c) the following clause shall be substituted, namely:—

"(c) a separate abstract of the valuation report in respect of all business transacted in India in each class or sub-class of insurance business to which section 13 refers, prepared in the manner required by that section, and".

13. In section 17 of the said Act, after the *Amendment of section 17, Act IV of 1938.* words "and such copies so sent" the words "shall be chargeable with the same fees and" shall be inserted.

14. To sub-section (2) of section 21 of the said Act the following proviso shall be added, namely:—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of four months from the time when the Superintendent of Insurance made the order or declined to accept the return."

15. In section 22 of the said Act, after the *Amendment of section 22, Act IV of 1938.* the word "refers" the following shall be inserted, namely:—

"or an abstract of a valuation report furnished under clause (c) of sub-section (2) of section 16."

Omission of section 24, Act IV of 1938. 16. Section 24 of the said Act shall be omitted.

Amendment of section 26, Act IV of 1938. 17. To section 26 of the said Act the following sentence shall be added, namely:—

"All such particulars shall be authenticated in the manner required by that sub-section for the authentication of the matters therein referred to, and, where the altera-

tion affects the assured rates, advantages, terms and conditions offered in connexion with life insurance policies, the actuarial certificate referred to in clause (f) of the said sub-section shall accompany the particulars of the alteration."

Amendment of section 28, Act IV of 1938.

18. In section 28 of the said Act,—

(a) for sub-section (1) the following sub-sections shall be substituted, namely:—

"(1) Every insurer registered under this Act carrying on the business of life insurance shall every year, within thirty-one days from the beginning of the year, submit to the Superintendent of Insurance a statement showing as at the 31st day of December of the preceding year the assets held invested in accordance with section 27, and all other particulars necessary to establish that the requirements of that section have been complied with, and such statement shall be certified by a principal officer of the insurer.

(2) Every such insurer shall also furnish, within fifteen days from the last day of March, June and September, a statement certified as aforesaid showing as at the end of each of the said months the assets held invested in accordance with section 27.

(3) The Superintendent of Insurance may at his discretion require any insurer to whom sub-section (1) applies to submit before the 1st day of August in each or any year a statement of the nature referred to in sub-section (1), certified as required by that sub-section and prepared as at the 30th day of June.

(4) In the case of an insurer having his principal place of business or domicile outside British India, the Superintendent of Insurance may, on application made by the insurer, extend the periods of fifteen and thirty-one days mentioned in the foregoing sub-sections to thirty days and sixty days, respectively."

(b) sub-section (2) shall be re-numbered as sub-section (5).

19. Section 29 of the said Act shall be re-numbered as sub-section (1) of that section and to the section

Amendment of section 29, Act IV of 1938.

as so re-numbered the following sub-section shall be added, namely:—

"(2) The provisions of section 86D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of an insurer being a company, if the loan is one granted on the security of a policy on which the

insurer bears the risk and the policy was issued to the director on his own life, and the loan is within the surrender value of the policy."

Amendment of section 33, Act IV of 1938.

20. In section 33 of the said Act,—

(a) in sub-section (1), for the words beginning with "appoint an auditor or actuary or both" and ending with "himself make such investigation" the following shall be substituted, namely:—

"order an investigation of the affairs of the insurer to be made by an auditor or actuary, or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor, or may himself make such investigation:

Provided that an auditor or actuary appointed for this purpose by the Superintendent of Insurance shall not be an auditor or actuary in the employ of the insurer."

(b) to sub-section (2) the following proviso shall be added, namely:—

"Provided that no application under this sub-section shall be entertained unless it is made before the expiration of three months from the date on which the Superintendent of Insurance intimates to the insurer his intention to take such action."

(c) for sub-section (3) the following sub-section shall be substituted, namely:—

"(3) The results of any investigation made under this section shall be recorded in writing by the auditor or actuary appointed or by the Superintendent of Insurance, as the case may be, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the investigation is completed a copy of such record, or where both an auditor and an actuary have been appointed, of each such record, shall be furnished by the Superintendent of Insurance to the insurer and to the shareholders or the policy-holders who have sent a requisition for such an investigation."

Amendment of section 34, Act IV of 1938.

21. In section 34 of the said Act,—

(a) after the words "incidental to such investigation" the words, brackets and figures "including any expenses incurred before the making of an order by the Court under sub-section (2) of section 33" shall be inserted, and shall be deemed always to have been inserted; and

(b) to the section the following words shall be added and shall be deemed always to have been added, namely:—

"shall have priority over other debts due from the insurer, and shall be recoverable as an arrear of land-revenue".

Amendment of section 35, Act IV of 1938. 22. In sub-section (3) of section 35 of the said Act,—

(a) for the words "and certified copies of the following documents shall be furnished to the Central Government and shall" the following words shall be substituted, namely :—

"and certified copies, four in number, of each of the following documents shall be furnished to the Central Government, and other such copies shall";

(b) in the proviso, after the words and figures "sections 11 and 13" the following shall be inserted and shall be deemed always to have been inserted, namely :—

"of this Act or sections 7 and 8 of the Indian Life Assurance Companies Act, 1912".

Amendment of section 36, Act IV of 1938. 23. To section 36 of the said Act the following proviso shall be added, namely :—

"Provided that —

(a) no part of the deposit made by any party to the amalgamation or transfer shall be returned except where, after effect is given to the arrangement, the whole of the deposit to be made by the insurer carrying on the amalgamated business or the person to whom the business is transferred is completed,

(b) only so much shall be returned as is no longer required to complete the deposit last mentioned in clause (a), and

(c) while the deposit last mentioned in clause (a) remains uncompleted, no accession, resulting from the arrangement, to the amount already deposited by the insurer carrying on the amalgamated business or the person to whom the business is transferred shall be appropriated as payment or part payment of any instalment of deposit subsequently due from him under section 7 or section 98."

Amendment of section 37, Act IV of 1938. 24. In section 37 of the said Act,—

(a) for the words "where any business of one insurer is transferred to another" the words "where any business of an insurer is transferred" shall be substituted;

(b) for the words "the insurer to whom the business is transferred" the words "the person to whom the business is transferred" shall be substituted;

(c) for the words "furnish to the Central

Government" the words "furnish in duplicate to the Central Government" shall be substituted;

(d) in clause (b), for the words "a declaration signed by every insurer concerned" the words "a declaration signed by every party concerned" shall be substituted;

(e) for clause (c) the following clause shall be substituted, namely :—

"(c) where the amalgamation or transfer has not been made in accordance with a scheme sanctioned by the Court under section 36—

(i) balance-sheets in respect of the insurance business of each of the insurers concerned in such amalgamation or transfer prepared in the Form set forth in Part II of the First Schedule and in accordance with the regulations contained in Part I of that Schedule, and

(ii) certified copies of any other reports on which the scheme of amalgamation or transfer was founded."

25. In sub-section (2) of section 38 of the said Act, for the words "together with" the word "and" and for

the words "has been delivered" the words "have been delivered" shall be substituted.

Amendment of section 39, Act IV of 1938. 26. In section 39 of the said Act,—

(a) in sub-section (1), the words "not being an absolute assignee of the benefits under the policy" shall be omitted;

(b) to sub-section (4) the following proviso shall be added, namely :—

"Provided that the assignment of a policy to the insurer who bears the risk on the policy at the time of the assignment, in consideration of a loan granted by that insurer on the security of the policy within its surrender value, or its re-assignment on repayment of the loan shall not cancel a nomination, but shall affect the rights of the nominee only to the extent of the insurer's interest in the policy."

Notes.—The words "or its re-assignment on repayment of the loan" which were inserted, by the Select Committee, in the proviso now added, are intended to remove any doubt whether, when assignment of the nature referred to is cancelled by the re-assignment of the policy to the holder that re-assignment can affect the rights of the nominee.

Amendment of section 41, Act IV of 1938. 27. In section 41 of the said Act,—

(a) in sub-section (1),—

(i) for the words "effect or renew" the words "take out or renew or continue" shall be substituted, and after the word "renew."

ing" the words "or continuing" shall be inserted ;

(ii) the following proviso shall be added : —

"Provided that acceptance by an insurance agent of commission in connection with a policy of life insurance taken out by himself on his own life shall not be deemed to be acceptance of a rebate of premium within the meaning of this sub-section if at the time of such acceptance the insurance agent satisfies the prescribed conditions establishing that he is a *bona fide* insurance agent employed by the insurer." ;

(b) in sub-section (2), for the words "effecting or renewing" the words "taking out or renewing or continuing" shall be substituted.

Amendment of section 42, Act IV of 1938.

28. In section 42 of the said Act,—

(a) in sub-section (1), for the words "one rupee" the words "three rupees" and for the words "making an application under this section" the words "making an application in the prescribed manner" shall be substituted ;

(b) in sub-section (3), for the words "a fee of one rupee" the following words shall be substituted, namely : —

"the prescribed fee which shall not be more than three rupees, and an additional fee of a prescribed amount not exceeding one rupee by way of penalty if the application for renewal of the licence does not reach the issuing authority before the date on which the licence ceases to remain in force" ;

(c) in sub-section (4),—

(i) in clause (c)—

(a) after the word "cheating" the following words shall be inserted, namely : —

"or forgery or an abetment of or attempt to commit any such offence" ;

(b) the following proviso shall be added, namely : —

"Provided that, where at least five years have elapsed since the completion of the sentence imposed on any person in respect of any such offence, the Superintendent of Insurance shall ordinarily declare in respect of such person that his conviction shall cease to operate as a disqualification under this clause ;" ;

(ii) in clause (d), for the words "against an insurer or an assured" the words "against an insurer or an insured" shall be substituted ;

(d) after sub-section (5) the following

sub-section shall be added, namely : —

"(6) The authority which issued any licence under this section may issue a duplicate licence to replace a licence lost, destroyed or mutilated on payment of the prescribed fee which shall not be more than one rupee."

29. In sub-section (1) of section 43 of the said Act the word "licensed," in both places where it occurs, shall be omitted.

30. In section 44 of the said Act the words and figures "licensed under section 42" shall be omitted.

Amendment of section 45, Act IV of 1938.

31. In section 45 of the said Act,—

(a) for the words "was on a material matter and fraudulently made" the words "was on a material matter or suppressed facts which it was material to disclose and that it was fraudulently made" shall be substituted, and after the words "that the statement was false" the words "or that it suppressed facts which it was material to disclose" shall be added ;

(b) the following proviso shall be added, namely : —

"Provided that nothing in this section shall prevent the insurer from calling for proof of age at any time if he is entitled to do so, and no policy shall be deemed to be called in question merely because the terms of the policy are adjusted on subsequent proof that the age of the life insured was incorrectly stated in the proposal."

Notes.—The proviso added now makes it clear that the insurer has the right to call for proof of age at any time if he is so entitled.

32. In sub-section (1) of section 47 of the said Act, for the words "the insurer shall" the words "the insurer may" shall be substituted.

Amendment of section 48, Act IV of 1938.

33. In section 48 of the said Act,—

(a) in sub-section (1), for the words beginning with "shall be persons having the prescribed qualifications" and ending with "by the holders of policies of life insurance issued by the company" the following words shall be substituted, namely : —

"shall notwithstanding anything to the contrary in the Articles of Association of the company be elected in the prescribed manner by the holders of policies of life insurance issued by the company" ;

(b) sub-section (2) shall be re-numbered as sub-section (4) and the following shall be inserted as sub-sections (2) and (3), namely :—

"(2) Only and all persons holding otherwise than as assignees policies of life insurance issued by the company of such minimum amount and having been in force for such minimum period as may be prescribed shall be eligible for election as directors under sub-section (1), and only and all persons holding policies of life insurance issued by the company and having been in force at the time of the election for not less than six months shall be eligible to vote at such elections :

Provided that the assignment of a policy to the person who took out the policy shall not disqualify that person for being eligible for election as a director under sub-section (1).

(3) The Central Government may, for such period, or to such extent and subject to such conditions as may be specified by it in this behalf, exempt from the operation of this section—

(a) any Mutual Insurance Company as defined in clause (a) of sub-section (1) of section 95, in respect of which the Superintendent of Insurance certifies that in his opinion owing to the conditions governing membership of the company or to the nature of the insurance contracts undertaken by it the application of the provisions of this sub-section to the company is impracticable, or

(b) any company in respect of which the Superintendent of Insurance certifies that in his opinion the company, having taken all reasonable steps to achieve compliance with the provisions of this section, has been unable to obtain the required number of directors with the required qualifications."

Substitution of new section for section 49, Act IV of 1938.

"49. No insurer, being an insurer specified in sub-clause (a) (ii) or sub-clause (b) of clause (9) of section 2, who carries on the business of life insurance or any other class or sub-class of insurance business to which section 18 applies, shall, for the purpose of declaring or paying any dividend to share-holders or any bonus to policy-holders or of making any payment in service of any debentures, utilize directly or indirectly any portion of the life insurance

fund or of the fund of such other class or sub-class of insurance business, as the case may be, except a surplus shown in the valuation balance-sheet in Form I as set forth in the Fourth Schedule submitted to the Superintendent of Insurance as part of the abstract referred to in section 15 as a result of an actuarial valuation of the assets and liabilities of the insurer; nor shall he increase such surplus by contributions out of any reserve fund or otherwise unless such contributions have been brought in as revenue through the revenue account applicable to that class or sub-class of insurance business on or before the date of the valuation aforesaid, except when the reserve fund is made up solely of transfers from similar surpluses disclosed by valuations in respect of which returns have been submitted to the Superintendent of Insurance under section 15 of this Act or to the Central Government under section 11 of the Indian Life Assurance Companies Act, 1912 :

Provided that payments made out of any such surplus in service of any debentures shall not exceed fifty per cent. of such surplus including any payment by way of interest on the debentures, and interest paid on the debentures shall not exceed ten per cent. of any such surplus except when the interest paid on the debentures is offset against the interest credited to the fund or funds concerned in deciding the interest basis adopted in the valuation disclosing the aforesaid surplus."

Amendment of section 50, Act IV of 1938.

35. To section 50 of the said Act the following words shall be added, namely :—

"unless these are set forth in the policy".

Amendment of section 52, Act IV of 1938.

36. Section 52 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-sections shall be added, namely :—

"(2) On the expiry of the period of three years referred to in sub-section (1), or on the insurer's ceasing before such expiry but at any time after the commencement of the Insurance (Amendment) Act, 1941, to carry on business on the dividing principle, the insurer shall forthwith cause an investigation to be made by an actuary, who shall determine the amount accumulated out of the contributions received from the holders of all policies to which the dividing principle applies and the extent of the claims of those policy-holders against the realisable

assets of the insurer, and shall, before the expiration of six months from the date on which he is entrusted with the investigation, make recommendations regarding the distribution, whether by cash payments or by the allocation of paid up policies or by a combination of both methods, of such assets as he finds to appertain to such policyholders; and the insurer shall, before the expiry of six months from the date on which the actuary makes his recommendations, distribute such assets in accordance with those recommendations.

(3) Where at any time prior to the commencement of the Insurance (Amendment) Act, 1941, an insurer has ceased to carry on business on the dividing principle, the insurer shall, before the expiration of two months from the commencement of that Act, report to the Superintendent of Insurance the measures taken or proposed by him for the distribution among holders of policies to which the dividing principle applies of the assets due to them and the Superintendent of Insurance may either sanction such measures or refuse his sanction, and, if he refuses his sanction or if the insurer does not report to him as required by this sub-section, the provisions of sub-section (2) shall apply to the insurer forthwith."

Amendment of section 53, Act IV of 1938. **37.** In section 53 of the said Act,—

(a) in sub-section (1), for the word "Chapter" the word "Act" shall be substituted;

(b) in sub clause (ii) of clause (b) of sub-section (2), after the words "has continued such failure" the words "or having contravened any provision of this Act has continued such contravention" and after the words "notice of such failure" the words "or contravention" shall be inserted.

Amendment of section 69, Act IV of 1938. **38.** In section 69 of the said Act,—

(a) in sub-section (1), for the words "the results of a distribution, amongst policies maturing for payment within certain time-limits, of certain sums" the following words shall be substituted, namely:—

"the results of a distribution of certain sums amongst policies becoming claims within certain time-limits, or on the principle that the premiums payable by a policyholder depend wholly or partly on the number of policies becoming claims within certain time limits";

(b) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Where after the commencement of the Insurance (Amendment) Act, 1941, a provident society is to be wound up in pursuance of this section, or where, whether before or after the commencement of that Act, a provident society ceases to carry on business on the dividing principle, the provisions of sub-section (2) and sub-section (3) of section 52 shall, so far as may be, apply in like manner as they apply to an insurer ceasing to carry on business on the dividing principle."

Amendment of section 70, Act IV of 1938. **39.** In section 70 of the said Act,—

(a) in sub-section (2),—

(i) in clause (a), after the words and figures "Indian Companies Act, 1913." the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted;

(ii) to clause (b) the following words shall be added, namely:—

"the full address of the registered office of the society, the full address of the principal office of the society in British India, the name of the manager at such office, and the name and address of some one or more persons resident in British India authorised to accept any notice required to be served on the society";

(iii) the word "and" at the end of clause (c) shall be omitted and after clause (d) the following word and clause shall be added, namely:—

"and

(e) the prescribed fee for registration being not more than two hundred rupees.";

(b) in sub-section (4),—

(i) in clause (c), after the word "requirement" the words "or having contravened any provision" and after the word "failure", in both places where it occurs, the words "or contravention" shall be inserted;

(ii) after the proviso the following proviso shall be added, namely:—

"Provided further that the Superintendent of Insurance may, without previous notice and without application to the Court for sanction,—

(a) cancel the registration of a provident society which has failed to have its registration renewed, or

(b) cancel, on such terms and conditions as he thinks fit, the registration of any provident society which applies to him for such cancellation if he is satisfied that the society has ceased to carry on insurance

business and that all its liabilities in respect of insurance policies are either satisfied or otherwise provided for.”;

(c) after sub-section (4) the following sub-sections shall be added, namely :—

“(5) When a registration is cancelled the provident society shall not, after the cancellation has taken effect, enter into any new contracts of insurance, but all rights and liabilities in respect of contracts of insurance entered into by it before such cancellation takes effect shall, subject to the provisions of section 88, continue as if the cancellation had not taken place.

(6) Where a registration is cancelled under clause (b) of sub-section (4), or because the society has failed to have its registration renewed, the Superintendent of Insurance may at his discretion revive the registration if the provident society, within six months from the date on which the cancellation took effect, makes the deposits required by section 73 or has had an application under sub-section (3) of section 70A accepted, as the case may be, and complies with any directions which may be given to it by the Superintendent of Insurance.”

Insertion of new sections 70A and 70B in Act IV of 1938.

40. After section 70 of the said Act the following sections shall be inserted, namely :—

“70A. (1) Every provident society registered under this Act, or under the Provident Insurance Societies Act, 1912, shall have its registration renewed annually for each period of twelve months after that ending on the 30th day of June, 1942.

(2) An application for the renewal of a registration shall be made by the society to the Superintendent of Insurance before the 30th day of June preceding the period for which renewal is sought, and shall be accompanied as provided in sub-section (3) by evidence of payment of the prescribed fee which shall not exceed two hundred rupees but may vary according to the volume of insurance business done by the society.

(3) The prescribed fee for the renewal of a registration for any year shall be paid into the Reserve Bank of India, or where there is no office of that Bank into the Imperial Bank of India acting as the agent of that Bank or into any Government treasury and the receipt shall be sent along with the application for renewal of the registration.

(4) If a provident society fails to apply for renewal of registration before the date specified in sub-section (2) the Superinten-

dent of Insurance may, so long as he has taken no action under section 88 to have the society wound up, accept an application for renewal of registration on receipt from the society of the fee payable with the application and such penalty, not exceeding the prescribed fee payable by the society, as he may require.

(5) The Superintendent of Insurance shall, on being satisfied that the society has fulfilled the requirements of this section, renew the registration and grant it a certificate of renewal of registration.

70B. (1) Every provident society registered under section 70 before the commencement of the Insurance (Amendment) Act, 1941, shall, before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance such particulars in addition to those already supplied for the purpose of obtaining registration as are required by sub-section (2) of section 70 of this Act as amended by the Insurance (Amendment) Act, 1941.

(2) Every provident society registered under the provisions of the Provident Insurance Societies Act, 1912, shall before the expiration of three months from the commencement of the Insurance (Amendment) Act, 1941, furnish to the Superintendent of Insurance so far as it has not already done so the documents and information required by clauses (a) and (b) of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section.

(3) When any alteration occurs or is made which affects any of the matters which are required under the provisions of sub-section (2) of section 70 to accompany an application by a provident society for registration under that section, or are to be furnished to the Superintendent of Insurance under this section, the provident society shall furnish forthwith to the Superintendent of Insurance full particulars duly authenticated of such alteration.”

41. In section 72 of the said Act, the words “established after the commencement of this Act” shall be omitted.

42. In sub-section (1) of section 74 of the said Act,—

Amendment of section 74, Act IV of 1938.

Supplementary information and reports of alterations in particulars furnished with application for registration.

(a) the words "established after the commencement of this Act" shall be omitted;

(b) in clause (o), after the words and figures "Indian Companies Act, 1913," the words and figures "or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any Act repealed thereby," shall be inserted.

43. In section 77 of the said Act, for the *Amendment of section 77, Act IV of 1938.* word "shall have an office" the words "shall have in British India a principal office" shall be substituted.

Amendment of section 79, Act IV of 1938. **44.** In section 79 of the said Act,—

(a) for the words "shall keep at its registered office" the words "shall keep at its principal office in British India" shall be substituted;

(b) for clauses (a) to (d) the following clause shall be substituted, namely :—

"(a) such registers in such form as may be prescribed;"

(c) clauses (e), (f) and (g) shall be re-lettered, respectively, as clauses (b), (c) and (d).

Amendment of section 82, Act IV of 1938. **45.** In section 82 of the said Act,—

(a) in sub-section (1), for the words "and the statements referred to" the words "shall be printed and four copies of these and of the statements referred to" and for the words "within three months" the words "within six months" shall be substituted;

(b) in sub-section (3), before the words "The provisions of section 17" the following shall be inserted, namely :—

"The provisions of sub-section (2) of section 15 relating to the copies therein referred to shall apply to the returns referred to in sub-section (1) of this sub-section, and",

and to the sub-section as so amended the following shall be added, namely :—

"and the Superintendent of Insurance may exercise, in respect of returns made by a provident society and in respect of an investigation or valuation to which section 81 refers, the same powers as are exercisable by him under section 21 and section 22, respectively, in the case of an insurer".

Amendment of section 83, Act IV of 1938. **46.** In section 83 of the said Act,—

(a) in sub-section (1), for the word "established" the word "registered", for the words "shall cause any new scheme which it proposes to put into operation" the words

"shall cause any scheme which it proposes to put into operation for the first time" and for the words "that the scheme is sound" the words "that the rates, advantages, terms and conditions of the scheme are workable and sound" shall be substituted;

(b) in sub-section (3), for the words "and shall send the report of the actuary" the words, brackets and figures "and shall, before the expiration of six months from the commencement of the Insurance (Amendment) Act, 1941, send the report of the actuary" shall be substituted;

(c) in sub-section (4), for the words "it is actuarially sound" the words "the rates, advantages, terms and conditions are workable and sound" shall be substituted;

(d) for sub-section (5) the following sub-section shall be substituted, namely :—

"(5) If the rates, advantages, terms and conditions of any scheme are not reported by the actuary to be workable and sound, the Superintendent of Insurance shall give notice to the society prohibiting the scheme and the society shall not after its receipt of such notice enter into any new contract of insurance under the scheme, but all rights and liabilities in respect of contracts of insurance entered into by the society before receipt of the notice shall, subject to the provisions of sub-section (6), continue as if the notice had not been given.";

(e) in sub-section (6), for the word "discontinued", in both places where it occurs, the word "prohibited" and for the word "discontinuance" the word "prohibition" shall be substituted.

Amendment of section 85, Act IV of 1938. **47.** In section 85 of the said Act,—

(a) in sub-section (1), for the words "invest all surplus assets in such securities" the following words shall be substituted, namely :—

"invest in such securities every increase that takes place in those assets and in that part of those assets which is held in cash as soon as practicable after the increase takes place and in any case within six months of its taking place",

and to the sub-section as so amended the following proviso shall be added, namely :—

"Provided that for the purpose of determining the amount to be invested under this sub-section, any deposit made in cash under section 73 shall be taken into account as if such cash were Government securities amounting at the market value of the secu-

rities on the date the deposit was made to the total deposited in cash.”;

(b) after sub-section (4) the following sub-section shall be added, namely:—

“(5) The provisions of section 86D of the Indian Companies Act, 1913, shall not apply to a loan granted to a director of a provident society being a company if the loan is one granted on the security of a policy on which the society bears the risk and the policy was issued to the director on his own life and the loan is within the surrender value of the policy.”

Amendment of section 87, Act IV of 1938. **48.** In section 87 of the said Act,—

(a) in sub-section (1), after the words “the principal office of a provident society” the words “or the principal office in British India of a society having its principal place of business or domicile outside British India” shall be inserted, and to the sub-section as so amended the following words shall be added namely:—

“or by both an auditor and an actuary appointed simultaneously, or first by an auditor only or an actuary only and afterwards by an actuary or auditor”;

(b) for sub-section (3) the following sub-section shall be substituted, namely:—

“(3) The results of any such inquiry shall be recorded in writing by the person making the inquiry, and four copies of the record shall be supplied to the Superintendent of Insurance; and when the inquiry is completed, a copy of the record, or of each such record where more than one are made in the course of the same inquiry, shall be sent by the Superintendent of Insurance to the society concerned and shall be open to inspection by any member or policy-holder of the society.”;

(c) after sub-section (3), as so substituted, the following sub-section shall be added, namely:—

“(4) All expenses of and incidental to any inquiry made by an auditor or actuary under sub-section (1) including any expenses incurred before the date on which the Superintendent of Insurance receives notice of an appeal under clause (e) of sub-section (1) of section 110 shall be defrayed by the provident society, shall have priority over other debts due from the society, and shall be recoverable as an arrear of land-revenue.”

Amendment of section 88, Act IV of 1938. **49.** In section 88 of the said Act,—

(a) in sub-sections (1), (3) and (4), after the words and figures “Indian Companies Act, 1913,” the words and figures “or under the Indian Companies Act, 1882, or under the Indian Companies Act, 1866, or under any act repealed thereby” shall be inserted;

(b) in sub-sections (1) and (3), for the words “that Act” the words and figures “the Indian Companies Act, 1913” shall be substituted.

Amendment of section 90, Act IV of 1938. **50.** In section 90 of the said Act,—

(a) to sub-section (1) the following proviso shall be added, namely:—

“Provided that if the Superintendent of Insurance is not satisfied that the assets of the society are sufficient to meet the costs of liquidation including the remuneration of the liquidator, he may decline to make such appointment, and in such a case the society shall itself appoint a liquidator who shall carry out the liquidation as if the winding up was being done by an order of the Court.”;

(b) in sub-section (2), for the words “so appointed” the words “appointed by the Superintendent of Insurance under sub-section (1)” shall be substituted.

51. In clause (d) of sub-section (1) of *Amendment of section 91, Act IV of 1938.* section 91 of the said Act, after the word “liquidation” the following shall be inserted, namely:—

“including the remuneration of the liquidator and any expenses incurred under clause (g) of this sub-section”.

Amendment of section 92, Act IV of 1938. **52.** To section 92 of the said Act the following sub-section shall be added, namely:—

“(13) The costs of the liquidation including the remuneration of the liquidator and any expenses incurred under clause (g) of sub-section (1) of section 91 shall, if the liquidator decides that they shall be payable out of the assets of the society, be payable in priority to all other claims.”

Amendment of section 98, Act IV of 1938. **53.** In section 98 of the said Act,—

(a) in sub-section (2), for the words “of twenty-five thousand rupees” the words “of not less than twenty-five thousand rupees”, for the words “to twenty-five thousand rupees” the words “to not less than twenty-five thousand rupees” and for the words “equal to one-third of the gross premium” the words “equal to not less than one-third

of the gross premium" shall be substituted, and shall be deemed always to have been substituted;

(b) after sub-section (2), the following sub-section shall be added, and shall be deemed always to have been added, namely:—

"(3) The provisions of sub-section (7) of section 7 shall apply in respect of a Mutual Insurance Company and a Co-operative Life Insurance Society as if for the words 'under the foregoing provisions of this section' the words and figures 'under the provisions of section 98' were substituted."

54. In the proviso to section 100 of the said Act, the words *Amendment of section 100, Act IV of 1938.* "balance-sheet, revenue account and" shall be omitted and to the proviso as so amended the following words shall be added, namely:—

"and any member of the company domiciled in that province shall be entitled on application to the company to receive from it a copy of the balance-sheet and revenue account."

55. In sub-section (2) of section 102 of the said Act, for the words *Amendment of section 102, Act IV of 1938.* "any provident society which makes default in complying with any of the requirements of Part III" the words "any provident society as defined in Part III which makes default in complying with or acts in contravention of any of the requirements of this Act" shall be substituted and after the word "default," in the second, third and fourth places where it occurs, the words "or contravention" shall be inserted.

Amendment of section 103, Act IV of 1938. 56. In section 103 of the said Act,—

(a) in sub-section (1), for the word "transacts" the words "carries on" shall be substituted, the words and figures "section 6" and "section 97" shall be omitted, and for the word "transacted" the words "carried on" shall be substituted;

(b) in the proviso to sub-section (2), for the words "this section" the words, brackets and figures "sub-section (1) or sub-section (2)" shall be substituted;

(c) after sub-section (2) the following sub-section shall be added, namely:—

"(3) Any provident society or any person acting on behalf of a provident society who carries on any class of insurance business in contravention of any of the provisions of section 70, section 78 or section 83 or does any one or more of the acts constituting

the business of insurance in relation to any insurance business carried on in contravention of any of the said sections shall be punishable with fine which may extend to one thousand rupees."

57. Section 105 of the said Act shall be *Amendment of section 105, Act IV of 1938.* re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

58. (1) Section 106 of the said Act, shall *Amendment of section 106, Act IV of 1938.* be re-numbered as sub-section (1) of that section.

(2) In the section as so re-numbered, after the words, "If on the application of" the words "the Superintendent of Insurance or" shall be inserted and to the section as so amended the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

59. Section 107 of the said Act shall be *Amendment of section 107, Act IV of 1938.* re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

"(2) This section shall apply in respect of a provident society as defined in Part III as it applies in respect of an insurer."

60. In section 110 of the said Act, after sub-section (3) the following sub-section shall be added, namely:—

"(4) No appeal under this section shall be entertained unless it is made before the expiration of four months from the date on which the order appealed against was communicated to the appellant."

Amendment of section 113, Act IV of 1938. 61. In section 113 of the said Act,—

(a) for sub-sections (1) and (2) the following sub-sections shall be substituted, namely:—

"(1) A policy of life insurance under which the whole of the benefits become payable either on the occurrence, or at a fixed interval or fixed intervals after the occurrence, of a contingency which is bound to happen, shall, if all premiums have been paid for at least three consecutive years in the case of a policy issued by an insurer, or

five years in the case of a policy issued by a provident society as defined in Part III, acquire a guaranteed surrender value, to which shall be added the surrender value of any subsisting bonus already attached to the policy, and every such policy issued by an insurer shall show the guaranteed surrender value of the policy at the close of each year after the second year of its currency or at the close of each period of three years throughout the currency of the policy :

Provided that the requirements of this sub-section as to the addition of the surrender value of the bonus attaching to a policy at surrender shall be deemed to have been complied with where the method of calculation of the guaranteed surrender value of the policy makes provision for the surrender value of the bonus attaching to the policy :

Provided further that the requirements of this sub-section as to the showing of the guaranteed surrender value on a policy shall be deemed to have been complied with where the insurer shows on the policy the guaranteed surrender value of the policy by means of a formula accepted in this behalf by the Superintendent of Insurance as satisfying the said requirements :

Provided further that the provisions of this sub-section as to the showing of the guaranteed surrender value on a policy shall not take effect until after the expiry of six months from such date as the Central Government may, by notification in the official Gazette, appoint in this behalf.

Notes:— The first proviso which covers the diverse methods of calculating the surrender values of with profit policies, the second which covers cases in which a formula employed by insurers offers an acceptable alternative to the question of the surrender values at fixed intervals of time and the third proviso which defers the application of the new sub-section (1) for a time sufficient to enable insurers to prepare the new forms and documents, were added to the new sub-section (1) by the Select Committee.

(2) Notwithstanding any contract to the contrary, a policy which has acquired a surrender value shall not lapse by reason of the non-payment of further premiums but shall be kept alive to the extent of the paid-up sum insured, and the paid-up sum insured shall for the purposes of this sub-section include in full all subsisting reversionary bonuses that have already attached to the policy, and shall, where the policy is one on which the maximum number of annual premiums payable is fixed and the premiums are of uniform amount, be before the inclusion of such bonuses not less than

the amount bearing to the total sum insured by the policy exclusive of bonuses the same proportion as the total period for which premiums have already been paid bears to the maximum period for which premiums were originally payable.

(3) A policy kept alive to the extent of the paid-up sum insured under sub-section (2) shall not be entitled by virtue of that sub-section to participate in any profits declared distributable after the conversion of the policy into a paid up policy.”;

(b) sub-section (3) shall be re-numbered as sub-section (4) and in that sub-section as so re-numbered,—

(i) for the words “This section shall not apply to” the following shall be substituted, namely:—

“Sub-section (2) and sub-section (3) shall not apply”;

(ii) clause (a) shall be omitted,

(iii) for clause (b) the following clause shall be substituted, namely:—

“(a) where the paid-up sum insured by a policy, being a policy issued by an insurer, is less than one hundred rupees inclusive of any attached bonus, or takes the form of an annuity of less than twenty-five rupees, or where the paid-up sum insured by a policy, being a policy issued by a provident society as defined in Part III, is less than fifty rupees inclusive of any attached bonus or takes the form of an annuity of less than twenty-five rupees, or”;

(iv) clauses (c) and (d) shall be re-lettered as clauses (b) and (c), respectively.

Amendment of section 114, Act IV of 1938. 62. In sub-section (2) of section 114 of the said Act,—

(a) for clause (b) the following clause shall be substituted, namely:—

“(b) the manner in which it shall be determined which of the transactions of an insurer are to be deemed for the purposes of this Act to be insurance business transacted in India or in British India, as the case may be;”;

(b) in clause (g), after the words “may be” the words “applied for,” shall be inserted.

63. Section 116 of the said Act shall be re-numbered as sub-section (1) of that section and to the section as so re-numbered the following sub-section shall be added, namely:—

“(2) This section shall apply in respect of provident societies as defined in Part III as it applies in respect of insurers.”

Insertion of new section 116A in Act IV of 1938.

inserted, namely :—

"116A. The Central Government shall every year cause to be published, in such manner as it may direct, a summary of the accounts, balance-sheets, statements, abstracts and other returns under this Act or purporting to be under this Act which have been furnished in pursuance of the provisions of this Act to the Superintendent of Insurance during the year preceding the year of publication, and may append to such summary any note of the Superintendent of Insurance or of the Central Government and any correspondence :

Provided that nothing in this section shall require the publication of the statements referred to in sub-section (1) of section 28."

Amendment of section 117, Act IV of 1938. 65. In section 117 of the said Act, after the words "being a company" the words "or a provident society as defined in Part III being a company" shall be inserted.

Amendment of section 118, Act IV of 1938. 66. In section 118 of the said Act, after the words "and to such extent" the words "or subject to such conditions or modifications" shall be inserted.

Substitution of new section for section 119, Act IV of 1938. 67. For section 119 of the said Act the following section shall be substituted, namely :—

Inspection and supply of copies of published prospectus, etc. "119. Any person may on payment of a fee of five rupees inspect the documents filed by an insurer with the Superintendent of Insurance under clause (f) of sub-section (2) of section 3, and may obtain a copy of any such document or part thereof on payment in advance at the prescribed rate for the making of the copy."

Insertion of new section 122 in Act IV of 1938. 68. After section 121 of the said Act the following section shall be inserted, namely :—

Amendment of Schedule I, Act IX of 1908. "122. In Item No. 86 in the First Schedule to the Indian Limitation Act, 1908,—

(a) for the entry in the first column the following shall be substituted, namely :—

'(a) On a policy of insurance when the sum insured is payable after proof of the death has been given to or received by the insurers.

(b) On a policy of insurance when the sum insured is payable after proof of the loss has been given to or received by the insurers.';

(b) for the entry in the third column, the following shall be substituted, namely :—

'(a) The date of the death of the deceased.

(b) The date of the occurrence causing the loss.'"

Amendment of First Schedule, Act IV of 1938.

69. In Form A contained in Part II of the First Schedule to the said Act, —

(a) in the first column, after the entry "Miscellaneous Insurance Business Account" the brackets and letter "(m)" shall be added ;

(b) in the fifth column, after the entry "Outstanding Premiums (g)" the brackets and letter "(d)" shall be added, and

(c) after foot-note (l) the following shall be added, namely :—

"(m) Where the insurer is required to maintain a separate account in respect of any sub-class of miscellaneous insurance business this heading is to be split up accordingly."

Amendment of Third Schedule, Act IV of 1938. 70. In the Third Schedule to the said Act,—

(a) in regulation 1 contained in Part I, after the words "for every class" the words "or sub-class" shall be inserted ;

(b) in regulation 2,—

(i) after the words "miscellaneous insurance" the words "exclusive of any sub-class of such business in respect of which the insurer is required to maintain a separate account" shall be inserted ; and

(ii) the following sentence shall be added, namely :—

"For a sub-class of miscellaneous insurance in respect of which the insurer is required to maintain a separate account, Form D or Form F as set out in Part II of this Schedule may be used with such modifications as the Superintendent of Insurance may authorise." ;

(c) In Form D contained in Part II,—

(i) In the first column the entry "Commission to insurance agents (less that on Re-insurances)" shall be omitted, and for the entry '1'. Allowances and Commission (other than commission to insurance agents)" the following entry shall be substituted, namely :—

"1. (a) Commission to insurance agents (less that on Re-insurances).

(b) Allowances and Commission [other than commission included in sub-item (a) preceding]";

(ii) in the first column, after the entry "5. Auditors' fees" the entry "6. Medical fees" shall be inserted, and the existing entries numbered 6 to 12 shall be re-numbered 7 to 13, respectively;

(iii) all the horizontal lines appearing in the columns and the letters "Rs." against the entries "Interest, Dividends and Rents" and "Less—Income-tax thereon (d)" shall be omitted, and horizontal lines under which the totals of the columns are to be inserted shall be added at the foot of each column;

(iv) in note (a) the words "In the case of an insurer having his head office in British India" shall be omitted.

Amendment of 71. In Part II of the Fourth Schedule, Fourth Schedule to the Act IV of 1938. said Act,—

(a) in the opening paragraph beginning with the words "The following tabular statements"—

(i) in clause (d), for the semi-colon and the word "and" at the end of the clause the following shall be substituted, namely :—

"for the intervaluation period (except that it shall not be necessary to prepare such statement in respect of any class of business so long as the insurer deposits annually with the Superintendent of Insurance an abstract in respect of that class of business)";

(ii) clause (e) shall be omitted;

(b) in sub-paragraph (2) of the paragraph numbered 8, for the words "as at the valuation date" the words "as a result of this valuation" shall be substituted;

(c) in the paragraph numbered 9, between the word "fourth" and the word "sixth" the word "fifth" shall be inserted;

(d) for Form G the form contained in the Schedule to this Act shall be substituted;

(e) in Form J., for the heading to the first column "Number of premiums paid" the following heading shall be substituted, namely :—

"Number of annual premiums paid up to the valuation date"

and the following note shall be added after the existing note, namely :—

"NOTE.—The reserve value is to be based on the rate of office premium payable by an insured who entered at the age shown and who had, by the valuation date, paid the number of annual premiums shown in the first column."

SCHEDULE.

[See section 71 (d).]

Form to be substituted for Form G in the Fourth Schedule of the Insurance Act, 1938.

FORM G.

Consolidated Revenue Account of _____ for _____ years
commencing _____ and ending _____

	Business within India. (a)	Total.		Business within India. (a)	Total.
	Rs.	Rs.		Rs.	Rs.
Claims under Policies (including provision for claims due or intimated), less Re-insurances—			Balance of Life Insurance Fund at the beginning of the period.		
By death			Premiums, less Re-insurances—		
By maturity			(i) First year premiums.		
Annuities, less Re-insurances.			(ii) Renewal premiums.		
Surrenders (including surrenders of Bonus), less Re-insurances.			(iii) Single premiums.		
Bonuses in cash, less Re-insurances.			Consideration for Annuities granted, less Re-insurances (c).		
Bonuses in Reduction of Premiums, less Re-insurances.			Interest, Dividends and Rents		
			Rs.		
			Less—Income-tax thereon (d).		
			Rs.		

	Business within India. (a)	Total.		Business within India. (a)	Total.
	Rs.	Rs.		Rs.	Rs.
Expenses of Management (b) (c) —			Registration fees		
1. (a) Commission to insurance agents (less that on Re- insurances).			Other Income (to be specified).		
(b) Allowances and Commis- sion [other than com- mission included in sub- item (a) preceding].			Loss transferred to Profit and Loss Account.		
2. Salaries, etc., [other than to agents and those contained in sub-item 1 (b) preceding].			Transferred from Appropriation Account.		
3. Travelling expenses . . .					
4. Directors' fees . . .					
5. Auditors' fees . . .					
6. Medical fees . . .					
7. Law charges . . .					
8. Advertisements . . .					
9. Printing & Stationery . . .					
10. Other expenses of manage- ment (accounts to be speci- fied).					
11. Other payments (accounts to be specified).					
12. Rent for offices belonging to and occupied by the insurer.					
13. Rents of other offices occupied by the insurer.					
Bad debts . . .					
United Kingdom, British Indian, Dominion and Foreign Taxes.					
Other Expenditure (to be speci- fied).					
Profit transferred to Profit and Loss Account.					
Balance of Life Insurance Fund at end of the period as shown in the Balance-sheet.					
Rs.			Rs.		

NOTES.

(a) These columns apply to all business except business the premiums in respect of which are ordinarily paid outside India. If any question arises whether any premiums are ordinarily paid inside or outside India, the Superintendent of Insurance shall decide the question and his decision shall be final.

(b) If any sum has been deducted from this item and entered on the assets side of the balance-sheet, the amount so deducted must be shown separately.

(c) All single premiums for annuities, whether immediate or deferred, must be included under this heading.

(d) British Indian, United Kingdom, Foreign and Dominion income-tax on Interest, Dividends and Rents must be shown under this heading, less any rebates of income-tax recovered from the revenue authorities in respect of expenses of management. The separate heading on the other side of the account is for United Kingdom, British Indian, Foreign and Dominion taxes, other than those shown under this item.

(e) In the case of an insurer having his principal place of business outside British India the expenses of management for the total business need not be split up into the several sub-heads, if they are not so split up in his own country.

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

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NOMINAL INDEX

Appa Trimbak v. Waman Govind	85	*International Railway Co. v. Niagara Parks Commission	114
Banerji S. N. v. Kuchwar Lime and Stone Co. Ltd.	128	Ismail Ahmed Peepadi v. Momin Bibi	11
Bhowanipur Banking Corporation, Ltd. v. Durgesh Nandini Dassi	95	Iswar Ram Chandra v. Bengal Duars Bank Ltd.	33
Canada Rice Mills Ltd. v. Union Marine and General Insurance Co. Ltd.	68	*Jagadamba Loan Co. Ltd. v. Shiba Prasad Singh	36
Ceceily Harriett Matilda Peiris v. R. M. Sellamuttu Pillai	55	*Jagat Narayan v. Khartar Sah	45
*Chettiar M. M. R. M. Firm v. S. R. M. S. L. Chettiar Firm	47	Kotia J. E. v. K. B. J. Nahas	139
Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Province, Lahore v. Krishna Kishore, Rais, Lahore	120	*Krishnaswami Ayyangar v. Chevula Kama-lamma	90
Committee of Management of Gurdwara Penja Sahib v. Mohammad Nawaz Khan	56	*Mahomed Nawaz v. Emperor	132
Connors Bros, Ltd. v. Bernard Connors	75	Malik Mohammad v. Himtu Ram	34
Dairen Kisen Kabushiki Kaisha v. Shiang Kee	88	Michel Habib v. Sheikh Sulaiman El Taji	101
Ernest Hugh Canning v. Soobran Partab	106	Narayanan Chettyar v. Official Assignee, High Court Rangoon	93
*Firm O. Rm. O. M. Sp. v. Nagappa Chet-tiar	1	Nisar Ali Khan v. Mt. Fatima Sultan	62
**General Accident, Fire & Life Assurance Corporation Ltd. v. Janmahomed Abdul Rahim	6	Olga Hall v. Kingston and Saint Andrew Corporation	103
Heirs of Prince Mohamed Selim v. At-torney-General of Palestine	99	*Port Royal Pulp and Paper Co. Ltd. v. Royal Bank of Canada	134
*Hemanta Kumari Debi v. Gauri Shankar	88	Ramanathan Chettiar v. Viswanathan Chet-tiar	43
Hoani Te Heuhen Tukino v. Aotea Dis-trict Maori Land Board	109	*Ramanna v. Jagannadha Rao	48
		Secretary of State v. Rustam Khan	64
		Sin Maung v. Maung Bysung	51
		*Sris Chandra Nandy v. Rakhalananda	16
		*Sri Sri Baidyanathji v. Smt. Urmila Devi	130
		*Subhani Mt. v. Nawab	21

SUBJECT INDEX

- Act of State** — Treaty of cession of all sovereign rights—Rights conferred by treaty cannot be enforced in Court except so far as they are incorporated in municipal law 109b
- Administration** — Suit held not one for administration—Plaintiff claiming her share in joint property of her husband and his father and brother — Her children also made defendants, who claimed to have their share in the properties determined and partitioned—Children held entitled to relief 51
- Appeal**—Privy Council—Concurrent findings of fact by lower appellate Courts — Rule that Privy Council will not interfere in appeal is not inflexible — When Privy Council will interfere, stated 55
- Bank Act (Canada) (1934), S. 88**—Security must be given by owner 134a
- *Banker and customer** — *A* having account with bank drawing hundis for certain amount to be applied to charity by him and *B* and handing over hundis to *B* with authority to invest trust funds in his own business—Hundis though payable to bearer headed with name of charity—Bank crediting amount to account in name of charity — Subsequently, bank closing charity account and transferring trust funds to itself thereby cancelling over-draft account of *B* with it — *B* on same date opening new account in his business books in name of charity for amount of hundis — Bank held guilty of appropriating trust monies with knowledge of breach of trust and liable to restore monies to charity 1a
- Charge** — Valid charge can be created on whole of man's property — But charge for small sum on vast estate as a whole is improbable 16b
- *Civil Procedure Code (5 of 1908), S. 92** — Suit by trustee against stranger to recover trust property—S. 92 does not apply 1c
—S. 144—No decree varied—S. 144 does not apply 128a
—Ss. 151, 144 — Person found to be trespasser is not entitled to restitution as against person lawfully in possession: 128a
*—O. 21, Rr. 58 and 90 — Third party objecting to sale of his property for debt of **Civil P. C.**
another — He must proceed under R. 58 and not apply under R. 90 after sale 45
- Company**—Winding up—Onerous contract with creditor — Company unable to carry on its business and to pay its debts — It is just and equitable to wind it up 106a
—Company dissolved by act of country under whose law it was made juristic entity —Company must be treated as non-existent by all Courts administering English law: 88
- Contract** — Breach—Penal stipulation to pay sum agreed cannot be enforced—Agreed liquidated damages when can be enforced —Stipulation held penal 101a
—Contract of sale — Promise to pay purchase price in instalments amounts to payment of money 101b
—Covenant in restraint of trade — Onus to prove special circumstances, on whom lies (*Quære*) 75b
—Covenant in restraint of trade — Validity—Vendor company carrying on sardine business in Canada transferring same to another company — Covenant restraining vendor from engaging in any sardine business whatsoever in Dominion of Canada held valid and binding on vendor 75c
- Contract Act (9 of 1872), S. 23**—Agreement to stifle prosecution — Essence of defence stated—Defendant must establish contract whereby proposed or actual prosecutor agrees as part of consideration received or to be received not to bring or to discontinue criminal proceedings—Fact that debt forming consideration was real is irrelevant—Proof that actual crime was committed is not necessary — But each party should understand that one is making his promise in exchange for promise of other not to prosecute or continue prosecution 95a
- **Custom**—Proof of—Antiquity—English rule does not apply to India — Nature of proof of antiquity required explained: I L R (1937) Lah 594=(37) 24 A I R 1937 Lah 451 = 169 I C 909 (F B), **OVERRULED** 21a
- (**Punjab**)—Succession—Custom modifying ordinary law of succession must be ancient and invariable and should be established by unambiguous evidence—Burden of proof

Custom (Punjab)

lies heavily on plaintiff—Custom of succession by males only—Case of succession consistent only with aforesaid custom must be established—Cases of succession in family by males only capable of explanation other than alleged custom are not enough 62

—Religious institution—No general rule that property acquired by individual members of a religious fraternity belongs to religious institution 56c

—Ancestral land—Mere mention of common ancestor in pedigree is not sufficient 21a

** —Riwaj-i-am—Entries in—Initial presumption is in favour of their correctness—Presumption is weakened by fact that custom recorded therein is not in consonance with general custom or by the fact that females whose rights are affected had no opportunity to appear before the revenue authorities: I L R (1937) Lah 594=('37) 24 A I R 1937 Lah 451 = 169 I C 909 (F B), *OVERRULED* 21c

—Riwaj-i-am—Judicial decisions though of comparatively recent date may be sufficient to rebut presumption of correctness of entry in riwaj-i-am 21d

*—Succession—Tullas of Tahsil and District Shahpur—Non-ancestral property—Married daughters are not excluded by collaterals—Onus of proving special custom to contrary lies on collaterals: 39 P L R 566=('37) 24 A I R 1937 Lah 683=172 I C 158, *REVERSED* 21f

Customary right—Bathing ghat at Benares—Ordinarily, right of user takes its origin by acts of user and not by dedication—Complete abandonment of owner's right is unusual even if river is of exceeding sanctity 38c

Decree—Binding nature of—Party not party to proceedings can show decision to be inaccurate 128b

Deed—Construction—Sale deed—One coparcener purporting to transfer his interest in joint estate to other coparcener—Transaction held nominal in sense of not affecting right of parties inter se 48a

Evidence—Witness unreliable as some of his evidence found untrue—Statement of such witness cannot be relied on unless supported by independent evidence 95b

—Suit by priests for declaration that certain estate was charged with payment of their britti—Plaintiffs though having complete record of their transactions not producing any document evidencing charge

Evidence

—This is sufficient to cast doubt on their claim 16a

—Adverse inference—Plaintiff claiming to be A's legitimate son—Defendant pleading divorce of plaintiff mother by A before his birth—Neither party producing talaknama—No adverse inference can be drawn against either party 11a

—Chance witness—Evidence of, though not necessarily false, it is rash to rely on it 11e

****Evidence Act (1 of 1872), S. 2 (1)**—Evidence excluded by statute as inadmissible should not be admitted merely because it may be essential for ascertainment of truth: 41 C W N 1103 = 65 C L J 520, *REVERSED* 16f

—Ss. 4, 112—Discretion under S. 4 should be exercised in judicial manner according to circumstances of case—Marriage proved to have been performed on certain date—Court can either regard it as subsisting at subsequent date unless it is disproved or call for proof of it 11b

—S. 32—Evidence of tradition in family is hearsay evidence and is not admissible under S. 32 16e

—S. 41—Suit between A and B—Judgment that suit property did not belong to A as adopted son of C is not judgment in rem 85b

—Ss. 48 and 35—Answers given in Wilson's Manual on Questions of Customary Law in the Punjab are admissible 21b

—S. 112—Continuance of marriage need not be shown in any special manner 11c

—S. 114—Joint family trade—Manager for himself and on behalf of his minor brother executing mortgage to pay off trade debts—Suit to enforce mortgage—Manager and his brother summoned to produce account books—Both filing affidavits that account books were not with them nor did they know in whose possession they were—Evidence acquiesced in by plaintiff and no further steps taken—No adverse inference held could be drawn by non-production of account books: (1937) 2 M L J 559 = A I R 1937 Mad 816 = 176 I C 1003, *REVERSED* 43b

Foreign Jurisdiction Act (1890, 53 & 54 Vict., C. 37), S. 1—Agreement—Khan of Kalat granting to British Government by agreement in 1903 perpetual lease of Nasirabad Niabat part of Kalat territory at quit rent and ceding entire management of territory absolutely and with all rights and

Foreign Jurisdiction Act
privileges, State or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration — Prior to agreement predecessors of plaintiffs holding proprietorial rights over certain lands comprised in agreement — After agreement Government treating aforesaid lands as Government unoccupied lands — Suit by plaintiffs claiming that Government had no title to lands granted to them by Khan of Kalat — Agreement held was not mere "commercial agreement" but created rights between two sovereign States—Government held had full sovereign rights over territory and its act in refusing to recognize plaintiff's title to suit lands being act of State plaintiffs could have no recourse against Government in Municipal Courts 64

Fraud—Fraud must be established beyond all reasonable doubt — It cannot be based on suspicion and conjecture 93

Grant—Continuous payments alleged to be granted or charged not explainable without asserting some legal origin — Court would presume necessary legal origin 16c

Hindu law — Adoption — Mayukha — Widow can adopt unless expressly forbidden by husband notwithstanding that he died undivided—Consent of his surviving coparceners is not necessary 85a

—Alienation — Manager — Necessity — Manager of joint trading family incurring debt to pay off trade debts — Lender must show either necessity for loan or reasonable enquiry for necessity of loan, and facts if true would have justified loan: (1937) 2 M L J 559=(37) 24 A I R 1937 Mad 816 = 176 I C 1003, *REVERSED* 43a

—Partition—Mere separate living by one of brothers does not import division 120a

*—Partition — Sham agreement of sale whereby one coparcener pretending to transfer his fractional share to other coparceners — Reference in agreement by coparceners to their interest as represented by fractional share cannot change their joint status contrary to their intention to remain joint and undivided 48b

*—Religious Endowment—Bathing ghat at Benares — Dedication may be complete or partial 38a

*—Religious endowment — Dedication — Complete and partial — Difference explained 38b

—Religious endowment—De factoshebait of idol whether can sue on behalf of idol

Hindu law
to set aside permanent leases granted by hereditary shebait (*Quære*) 33

***Income-tax Act (11 of 1922)**, Ss. 3, 14 (1), 55—Income from impartible estate of holder is income of individual and not income of undivided family of himself and his sons: I L R (1939) Lah 520 = ('40) 27 A I R 1940 Lah 113 = 187 I C 676 (S B), *REVERSED* 120d

*—S. 9 — "Owner" — Holder of impartible estate receiving income from house property is not owner of property — Hence income is not assessable under Sec. 9: I L R (1939) Bom 284=(39) 26 A I R 1939 Bom 195=182 I C 712, *OVERRULED*: 120b

Insurance — Marine — Perils of seas explained— Whether in particular case there is loss due to peril of sea is a question of fact for jury 68b

—Marine — Causa proxima in insurance law does not necessarily mean cause last in time but what is "in substance" cause— Ventilators of ship closed to prevent incursion of sea water—Closing of ventilators causing rice cargo to heat and ferment and thus damaging it — Damage is recoverable as loss by perils of seas — Even otherwise loss falls within general words "all other perils, losses and misfortunes, etc." contained in insurance policy 68c

Interpretation of statutes—Court's duty to enforce law as enacted—It cannot question Legislature's policy 109a

Land Court Rules (Jaffa) (1921), R. 2— R. 2 is impliedly repealed by Establishment of Courts orders (1924.31) 99a

***Lessor and lessee**—Lessee mortgaging lease-hold interest—Mortgagee is not liable for burdens of lease by reason of privity of estate or contract whether or not he enters into possession 36

Limitation Act (9 of 1908)—Act must be enforced even at risk of hardship to particular party 6a

*—S. 10 (before amendment of 1929)—Decree in scheme suit — High priest of temples appointed trustee of all properties moveable and immovable devoted to service of temple God — High priest held trustee within S. 10 and suit to recover war bonds vested in him held not barred by any length of time: 19 P L T 367 = ('38) 25 A I R 1938 Pat 273=176 I C 209, *REVERSED* 130

—Art. 68—Suit to enforce bond by person to whom it is assigned under S. 292, Succession Act, is suit upon bond 6b

Lessor and lessee

** — *Art. 68* — Letters of administration granted to widow of deceased for benefit of minor sons and limited to period of minority of any of them — Administration bond under S. 291, Succession Act, furnished — Widow dying — Bond assigned under S. 292, Succession Act, to one of sons after he had attained majority — Suit on bond brought more than three years after death of widow held barred : 60 Bom 1027 = ('36) 23 A I R 1936 Bom 363 = 165 I C 672, *OVERRULED* 6c

Mahomedan law — Legitimacy — Acknowledgment — Wife poor and of lower social standing — Husband keeping marriage secret to some extent and not taking wife to live at his father's house — Child's claim as only child does not necessarily fail because father is not shown to have treated him as he should ordinarily have been treated — Important question in such circumstances to consider is whether father maintained and supported child 11d

Practice — Appeal — Lower Court decision vitiated by misdirection as regards onus — Dispute involving questions of law and fact — Appeal lying only on question of law — New trial held should be ordered 99c

— Inference from evidence — If it is not safe from evidence for appellate Court to draw particular inference it is also not safe for trial Court to draw inference 16d

Principal and agent — Agent can enter into contract on basis that he is himself to be liable to perform contract as well as his principal 114a

* **Privy Council** — Criminal appeals — When Privy Council will interfere in criminal cases and when certificate for appealing to Privy Council should be granted explained 132

— New points of law — Income-tax cases — New points of law should not be allowed to be raised for first time in Privy Council 120c

— Leave to appeal to — No legal principle involved — Concurrent findings of fact by lower Courts — Leave to appeal should not be granted 106b

— Respondent not appearing — Privy Council will not determine any matter not strictly within pleadings and issues even if material for decision be on record 85c

— Raising of questions by originating summons not appropriate — Courts below giving judgment on footing that questions

Privy Council

were properly raised — Privy Council in appeal would follow same course and deal with matters on that footing 75a

Public Health Law (1925), S. 89 — S. 89 has no application to corporations as such — Sub-s. (1) affords protection to persons only and not to bodies corporate or incorporate 103a

Record of Rights — Entry in — Rectification — Onus of proving that entry is wrong is on person who seeks rectification — Land (Settlement of Title) Ordinance, 1928.39, Ss. 43, 66 99b

Religious endowment — Dedication — Heavy onus lies on person who asserts that property belongs to religious institution 56a

— Practice of certain institution cannot be presumed from practice prevalent in majority of religious institutions — Rule of practice should be collected from its own constitution or practice as proved in evidence 56b

Rules of Court of British Columbia, O. 58, R. 4 — R. 4 is intended to obviate new trial in cases where such course can properly be avoided — R. 4 applies even to cases tried with jury — Jury finding that there were perils of seas while ship's ventilators were closed — Appellate Court can draw inference of fact that closing of ventilators was due to perils of seas 68a

Sind-Sagar Doab Colonization Act (1 of 1902), S. 3 — Agreements under Act with village proprietors for surrender of lands on statutory terms recorded in wajibularz of 1902 and 1926 — Scheme of Act abandoned and Act repealed in 1929 — Repeal of Act held did not render agreements invalid by reason of S. 4, Punjab General Clauses Act, so as to revive proprietors' right during interim period to reclaim lands — Agreements recorded in wajibularz held operated independently of Act and were binding on proprietors during period of transition and precluded them from reclaiming shamilat lands during that period 34

Succession Act (39 of 1925), S. 5 — Phrase referring to national law of *propositus* — Meaning explained 139

* — *S. 292* — S. 292 does not confer new cause of action on assignee : 60 Bom 1027 = ('36) 23 A I R 1936 Bom 363 = 165 I C 672, *OVERRULED* 6d

Tort — Conversion — Delivery of goods taken by person authorized to do so is not conversion of goods 134b

Tort

—Master and servant — Injury caused by negligence of servant of Corporation in discharge of his duty—Corporation is liable for damages 103b

Transfer of Property Act (4 of 1882), S. 53A — Whether applies to agreement to transfer of partial interest (*Quære*): 128c

—S. 53A—Scope —It only creates right of estoppel between proposed transferee and transferor and has no operation against third parties not claiming under them: 128d

*—S. 55 (6) (b) (*before amendment in 1929*) —Contract of sale cancelled and purchaser allowed to remain in possession till repayment of purchase price paid by him—Suit by subsequent transferee from seller for possession — Purchaser under cancelled sale alleging novation but not proving it — No question of statutory charge under S. 55 (6) (b) raised in trial Court — Appellate Court held could not entertain such question as it involved issues of fact neither raised nor considered—*B's* possession held did not amount to sufficient notice under S. 55 (6) (b) 47

*—S. 59—Equitable mortgage—Testator executing pronote and depositing title deeds of certain property as collateral security — Suit by plaintiff to enforce security— Subsequent mortgagee of security also impleaded— Security found to be invalid for want of registration — It is invalid for all purposes and not merely as between plaintiff and subsequent mortgagee — Plaintiff is entitled to simple money decree by virtue of pronote— Suit against subsequent mortgagee should be dismissed with costs—It is wrong for Court to direct sale of suit pro-

Transfer of Property Act

perty or to make any pronouncement as to validity or otherwise of subsequent mortgage or to give subsequent mortgagee any relief whether against property or against executors: 1936 MWN 367=(36) 23 AIR 1936 Mad 256 = 163 I C 195, *REVERSED* 90

***Trust** — Suit by trustee against stranger to recover trust funds applied in breach of trust falls under Art. 120 and not Art. 36, Limitation Act —Right to sue accrues when trustee becomes aware of breach 1b

—Suit by trustee to recover trust property — Question of accounts cannot be raised for the first time in Privy Council appeal 1d

***Vendor and purchaser** — Assignment of rights of vendor under contract of sale—Vendor to incur expenses before production or delivery of goods under contract — Claim by assignee against purchaser for purchase price — Purchaser must be given credit for all payments which he has been compelled to provide to obtain delivery 134c

*—Rights of vendor — Interest on purchase money—Purchaser getting possession of subject-matter before payment of purchase price—He must pay interest on purchase price in absence of express agreement to the contrary — This rule is not confined to cases of sale and purchase of lands but applies to all cases where specific performance would be granted by Courts of equity 114c

Words and Phrases—"Emanation"—Use of, while referring to agent or servant is not appropriate 114b

COMPARATIVE TABLES

Comparative Table of cases reported in Other Journals in 1941 which were already reported in All India Reporter in previous years.

A. I. R. 1939 Privy Council=Other Journals

AIR Other Journal
47 1941 R L R 789a

A. I. R. 1940 Privy Council=Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
54	1940 F C R 15	153con	7 B R 548	192con	73 C L J 612	215con	73 C L J 212
63	7 C L T 1	160	22 P L T 533	204	1941 O W N 518		1941 O W N 734
	22 P L T 425	167	73 O L J 106		73 O L J 121		ILR 1941 B 8
70	22 P L T 407	173	73 O L J 96		43 B L R 465		1941 M W N 729
75	1941 O W N 739		ILR 1941 M 1		1941 A L J 316	222	43 B L R 381
	1941 AWRPC 55				45 C W N 317		73 C L J 145
101	43 P L R 287	176	73 C L J 252	211	73 C L J 179	225	73 O L J 135
116	22 P L T 140	183	ILR 1941 M 89		43 B L R 459		43 B L R 450
	73 C L J 199		43 P L R 281		22 P L T 399		1941 AWRPC 21
137	73 O L J 261		1941 AWRPC 17		1941 R L R 355	230	43 P L R 168
151	43 B L R 403		73 C L J 387		43 B L R 388		43 B L R 372
153	1941 O L R 226	192	1941-1 M L J 427	215	1941-1 M L J 594		73 C L J 302
	192 I C 536		ILR 1941 B 107				

A. I. R. 1941 Privy Council=Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	1941 O L R 108	16con	ILR 1941 K P C 54	38con	7 B R 709	48con	1941 AWRPC 39
	192 I C 1		73 C L J 555		1941-2 M L J 1		1941 O L R 548
	7 B R 466		43 B L R 794		ILR 1941 K P C 71		54 M L W 57
	67 I A 448		68 I A 34		43 B L R 777		195 I C 1
	1941-1 M L J 393	21	43 B L R 432		22 P L T 639		43 P L R 515
	45 C W N 385		1941 AWRRev 314		73 C L J 568		7 B R 892
	ILR 1941 M 175		ILR 1941 L 154		1941 M W N 685		45 C W N 964
	73 C L J 166		193 I C 436		54 M L W 159		43 B L R 850
	53 M L W 522		1941 O L R 343		1941 O W N 1002		1941 A L J 673
	43 B L R 440		7 B R 665		1941 A L J 491		1941 O W N 1347
	1941 M W N 571		43 P L R 318		ILR 1941 A L J 401		68 I A 75
	ILR 1941 K P C 1		ILR 1941 K P C 22		68 I A 53		ILR 1941 K P C 83
6	1941 O W N 8		1941 A L J 530	43	193 I C 657	51	195 I C 118
	1941-1 M L J 88		68 I A 1		1941 O L R 381		1941 O L R 568
	72 O L J 497	33	45 C W N 497		7 B R 694		7 B R 932
	58 M L W 212		ILR 1941 K P C 51		54 M L W 1		1941-2 M L J 233
	67 I A 416		196 I C 12		22 P L T 566		74 C L J 112
	43 P L R 188		1941 O L R 714		1941 M W N 654		46 C W N 205
	1941 AWRPC 11		8 B R 66		ILR 1941 K P C 63	55	195 I C 658
	45 C W N 429	34	1941 O L R 382	45	195 I C 73		1941 A L J 499
	43 B L R 346		1941 AWRRev 334		1941 O L R 560		1941 O L R 629
	1941 M W N 320		193 I C 684		7 B R 915		7 B R 985
	193 I C 225		7 B R 697		1941 O W N 949		1941 O W N 1070
	1941 O L R 336		68 I A 47		1941-2 M L J 227		1941 AWRPC 85
	7 B R 660	36	193 I C 890		45 C W N 1019	56	1941 O W N 970
	ILR 1941 B 202		1941 AWRRev 332		1941 AWRPC 66		195 I C 721
	ILR 1941 K P C 11		54 M L W 3		43 B L R 860		1941 O L R 635
11	1941 O W N 565		20 Pat 521		22 P L T 755		7 B R 997
	1941 O L R 823		1941 M W N 651		54 M L W 484		1941 AWRRev 845
	193 I C 209		1941-2 M L J 58		20 Pat 791		43 P L R 631
	7 B R 650		ILR 1941 K P C 66		74 O L J 163		1941 A L J 610
	1941 AWRPC 27		73 C L J 563		43 P L R 676		43 B L R 998
16	1941 O W N 572		43 P L R 512		68 I A 97		23 P L T 1
	45 C W N 435		22 P L T 689		ILR 1941 K P C 88		74 O L J 428
	22 P L T 286		43 B L R 789	47	1941 O L R 552		ILR 1941 L 808
	58 M L W 469		1941 O L R 413		195 I C 9		68 I A 83
	1941 M W N 354		45 C W N 644		7 B R 896		ILR 1941 K P C 110
	193 I C 220		7 B R 715		54 M L W 237	62	1941 O W N 946
	1941 O L R 329		68 I A 67		1941 O W N 1030		1941 O L R 617
	7 B R 656	38	193 I C 882		1941 AWRRev 664		195 I C 639
	1941 AWRPC 34		1941 AWRRev 413		46 C W N 57		1941 AWRRev 750
	1941-1 M L J 746		1941 O L R 408		22 P L T 1055		7 B R 984
	ILR 1941-1 C 468		45 C W N 637	48	1941-2 M L J 58		1941 O W N 1345

12 A. I. R. 1941 PRIVY COUNCIL = ALL INDIA REPORTER (concl'd.)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
62 con 68	IA 104	90 con 1942	OWN 48	103	8 BR 96	128 con	ILR 1941 KPC 150
	ILR 1941 KPC 106	23	PLT 29		1941 AWRPC 47		74 CLJ 557
	1942 ALJ 110	74	CLJ 479		1941 OLR 746		46 CWN 374
64	195 IC 769	44	PLR 83		196 IC 549	130	1941 OLR 807
	1941 AWR Rev 743		ILR 1941 KPC 127	106	1941 AWRPC 51		196 IC 696
	1941 OLR 641	44	BLR 191		8 BR 187		8 BR 151
	8 BR 1		ILR 1942 M 82		1941 OLR 859		22 PLT 981
	54 MLW 397	93	196 IC 404		197 IC 118		1941 AWRPC 107
	68 IA 109		1941 AWR Rev 754	109	1941 OLR 753		1941 OWN 1367
	ILR 1941 KPC 94		1941 OLR 710		1941 AWRPC 42		1942 1 MLJ 8
68	8 BR 212	8	BR 56		196 IC 567		1942 ALJ 53
	1941 OLR 889	54	MLW 606		8 BR 102		74 CLJ 440
	197 IC 267		1941 ALJ 683	114	1941 AWRPC 76		55 MLW 31
75	58 MLW 266		1941 OWN 1392		197 IC 186		44 BLR 183
	1941 OLR 819	44	PLR 18		1941 OLR 888		1942 MWN 106
	196 IC 871	23	PLT 67		8 BR 197		ILR 1941 KPC 176
	8 BR 154	95	1941-2 MLJ 726	120	1941 OWN 1151		46 CWN 377
85	1941 OLR 726		1941 AWRPC 90		54 MLW 635	132	196 IC 692
	1941 AWRPC 86		1941 OLR 715		1941 AWRPC 98		1941 OLR 805
	1941-2 MLJ 733	8	BR 73		1941 OLR 798		8 BR 147
	54 MLW 534	54	MLW 529		196 IC 707		44 BLR 8
	196 IC 518		196 IC 463		8 BR 137		1941 ALJ 754
	8 BR 90	46	CWN 1		74 CLJ 508		1942-1 MLJ 5
	74 CLJ 471		1941 ALJ 668		1941-2 MLJ 972		1942 AWRPC 1
	ILR 1941 KPC 134		1942 MWN 1		1941-9 ITR 695		1942 OWN 41
88	196 IC 414	74	CLJ 408		1942 MWN 4		1942 MWN 38
	1941 AWRPC 69	44	BLR 1		ILR 1941 KPC 155		55 MLW 1
	1941 OLR 712		ILR 1941 KPC 141		44 BLR 196		44 PLR 45
	8 BR 61		ILR 1942-1 C 1		ILR 1942 L 1		ILR 1941 KPC 172
	54 MLW 610	99	1941 AWR Rev 747	128	1941 AWRPC 109		43 Cr LJ 1
90	1941 OLR 721	8	BR 184		22 PLT 1027		ILR 1942 L 36
	1941 AWRPC 94	197	IC 48		197 IC 399		1942 M Cr C 37
	196 IC 497		1941 OLR 846		8 BR 261	134	8 BR 242
	8 BR 86	101	1941 AWRPC 63		1941 OLR 914		1942 AWRPC 5
	54 MLW 613		1941 OLR 814		1942 OWN 48		197 IC 384
	1941-2 MLJ 894		196 IC 823		44 PLR 51	139	8 BR 285
	46 OWN 29	8	BR 118		55 MLW 79		197 IC 555

OTHER JOURNALS=ALL INDIA REPORTER

68 IA (Parts 1 & 2 only)	1941 AWR (PC)	1941 AWR (Rev)	43 Bom LR	73 CLJ
LR IA AIR	AWR AIR	AWR AIR	BLR AIR	CLJ AIR
1 1941 PC 21	1 1940 PC 215	332 1941 PC 36	403 1940 PC 151	252 1940 PC 176
34 " " 16	6 " " 211	334 " " 34	432 1941 " 21	261 " " 137
47 " " 34	11 1941 " 6	413 " " 38	440 " " 1	302 " " 230
53 " " 38	17 1940 " 183	664 " " 47	450 1940 " 225	387 " " 183
37 " " 36	21 " " 225	743 " " 64	459 " " 211	555 1941 " 16
75 " " 48	27 1941 " 11	747 " " 99	465 " " 204	563 " " 36
33 " " 56	34 " " 16	750 " " 62	777 1941 " 38	568 " " 38
97 " " 45	39 " " 48	754b " " 93	789 " " 36	612 1940 " 192
104 " " 62	42 " " 109	845 " " 56	850 " " 48	
109 " " 64	47 " " 103		860 " " 45	74 CLJ
	51 " " 106	ILR 1941 Bom	998 " " 56	CLJ AIR
ILR 1941 All	55 1940 " 75	ILR AIR	ILR (1941) 1 Cal	112 1941 PC 51
ILR AIR	63 1941 " 101	8 1940 PC 215	ILR AIR	163 " " 45
401 1941 PC 38	66 " " 45	107 " " 192	1 1940 PC 187	408 " " 95
	69 " " 88	202 1941 " 6	468 1941 " 16	440 " " 130
1941 ALJ	76 " " 114	43 Bom LR	73 CLJ	428 " " 56
ALJ AIR	85 " " 55	BLR AIR	CLJ AIR	471 " " 85
316 1940 PC 204	86 " " 85	1 1940 PC 192	96 1940 PC 173	479 " " 90
491 1941 " 38	90 " " 95	20 " " 176	106 " " 167	557 " " 128
499 " " 55	94 " " 90	132 " " 183	121 " " 204	ILR 1941 Lah
530 " " 21	98 " " 120	138 " " 202	135 " " 225	ILR AIR
610 " " 56	107 " " 130	141 " " 181	145 " " 222	154 1941 PC 21
668 " " 95	109 " " 128	346 1941 " 6	166 1941 " 1	803 " " 56
673 " " 48	1941 AWR (Rev) 872	1940 " 230	179 1940 " 211	43 PLR
688 " " 93	AWR AIR 881	" " 222	199 " " 116	PLR AIR
754 " " 132	314 1941 PC 21	888 " " 215	214 " " 215	68 1940 PC 215

43 P L R			196 I C			1941 M W N			1941 O W N			7 B R		
PLR	A I R		IC	A I R		MWN	A I R		OWN	A I R		BR	A I R	
138	1941	PC 6	696	1941	PC 130	1	1940	PC 204	43	1940	PC 176	709	1941	PC 38
168	1940	" 230	707	"	" 120	321	1941	" 6	74	"	" 183	715	"	" 36
281	"	" 183	823	"	" 101	354	"	" 16	513	"	" 204	892	"	" 48
287	"	" 101	871	"	" 75	571	"	" 1	565	1941	" 11	896	"	" 47
318	1941	" 21	ILR 1941 Mad			651	"	" 36	572	"	" 16	915	"	" 45
512	"	" 36	ILR A I R			654	"	" 43	734	1940	" 215	932	"	" 61
515	"	" 48	1 1940 PC 173			685	"	" 38	739	"	" 75	934	"	" 62
631	"	" 56	89 " " 183			729	1940	" 215	946	1941	" 62	985	"	" 55
676	"	" 45	175 1941 " 1			1941 O L R			949	"	" 45	997	"	" 56
794	"	" 16	(1941) 1 M L J			O L R A I R			970	"	" 56			
191 I C			MLJ A I R			1	1940	PC 225	1002	"	" 38	22 P L T		
IC	A I R		MLJ A I R			35	"	" 219	1030	"	" 47	PLT	A I R	
7	1940	PC 222	88 1941 PC 6			42	"	" 280	1070	"	" 55	1	1940	PC 230
94	"	" 204	130 1940 " 230			108	1941	" 1	1151	"	" 120	140	"	" 116
229	"	" 225	204 " " 160			226	1940	" 153	1345	"	" 62	286	1941	" 16
433	"	" 219	393 1941 " 1			323	1941	" 11	1367	"	" 48	399	1940	" 211
548	"	" 280	427 1940 " 192			329	"	" 16	1392	"	" 93	407	"	" 70
192 I C			594 " " 215			336	"	" 6	ILR 20 Pat			425	"	" 63
IC	A I R		746 1941 " 16			343	"	" 21	ILR A I R			533	"	" 160
1	1941	PC 1	(1941) 2 M L J			381	"	" 43	521	1941	PC 36	566	1941	" 43
538	1940	" 153	MLJ A I R			382	"	" 34	791	"	" 45	639	"	" 38
193 I C			1 1941 PC 88			408	"	" 38	7 B R			689	"	" 36
IC	A I R		53 " " 36			413	"	" 36	BR A I R			755	"	" 45
209	1941	PC 11	58 " " 48			548	"	" 48	1	1940	PC 158	981	"	" 130
220	"	" 16	227 " " 45			552	"	" 47	6	"	" 151	1027	"	" 128
225	"	" 6	233 " " 51			560	"	" 45	13	"	" 173	1055	"	" 47
436	"	" 21	726 " " 95			568	"	" 51	24	"	" 147	1941 R L R		
657	"	" 48	733 " " 85			617	"	" 62	49	"	" 167	RLR A I R		
684	"	" 34	894 " " 90			629	"	" 55	73	"	" 160	355	1940	PC 211
882	"	" 38	972 " " 120			635	"	" 56	97	"	" 181	789n	1939	" 47
890	"	" 36	53 M L W			641	"	" 64	103	"	" 183	ILR 1941 Kar (PC)		
195 I C			MLW A I R			710	"	" 93	110	"	" 192	ILR A I R		
IC	A I R		1 1940 PC 215			712	"	" 88	118	"	" 176	1	1941	PC 1
1	1941	PC 48	212 1941 " 6			714	"	" 93	129	"	" 187	11	"	" 6
9	"	" 47	266 " " 75			715	"	" 95	146	"	" 202	22	"	" 21
78	"	" 45	469 " " 16			721	"	" 90	149	"	" 211	54	"	" 16
118	"	" 51	522 " " 1			726	"	" 85	194	"	" 199	63	"	" 43
639	"	" 62	54 M L W			746	"	" 103	198	"	" 222	66	"	" 36
658	"	" 55	MLW A I R			753	"	" 109	210	"	" 215	51	"	" 33
721	"	" 56	1 1941 PC 48			798	"	" 120	218	"	" 204	71	"	" 33
769	"	" 64	8 " " 36			805	"	" 132	278	"	" 225	83	"	" 48
196 I C			57 " " 48			807	"	" 130	309	"	" 230	94	"	" 64
IC	A I R		159 " " 38			814	"	" 101	819	"	" 219	106	"	" 62
12	1941	PC 33	237 " " 47			819	"	" 75	466	1941	" 1	110	"	" 56
404	"	" 93	897 " " 64			846	"	" 99	548	1940	" 153	127	"	" 90
414	"	" 88	484 " " 45			859	4	" 106	650	1941	" 11	134	"	" 85
463	"	" 95	529 " " 95			883	"	" 114	656	"	" 16	141	"	" 95
497	"	" 90	534 " " 85			889	"	" 68	660	"	" 6	150	"	" 128
518	"	" 85	606 " " 93			914	"	" 128	665	"	" 21	155	"	" 120
549	"	" 103	610 " " 88			1941 O W N			694	"	" 48	172	"	" 132
567	"	" 109	618 " " 90			OWN A I R			697	"	" 34	176	"	" 130
692	"	" 182	635 " " 120			3	1941	PC 6						
						37	1940	" 101						

CASES OVERRULED & REVERSED

IN

(28) A. I. R. 1941 PRIVY COUNCIL

- Bahadur v. Mt. Nihal Kaur, (1937) I L R (1937) Lah 594=39 P L R 349=(24) AIR1937 Lah 451=169 I C 909 (F B) Overruled in (28) A I R 1941 P C 21.
- Commissioner of Income-tax, Bombay v. Abubacker Abdur Rehman, (1939) ILR (1939) Bom 284 = 41 B L R 232 = 1939 I T R 139=(26) AIR 1939 Bom 195=182 I C 712 Overruled in (28) AIR 1941 P C 120.
- Commissioner of Income-tax, Lahore v. Krishan Kishore, (1939) I L R (1939) Lah 520=1939 I T R 427=(27) AIR 1940 Lah 113=187 I C 676 (SB) Reversed in (28) AIR 1941 P C 120.
- Krishnaswami Aiyangar v. Gouriamma, (1936) 1936 M W N 367=(23) A I R 1936 Mad 256=163 I C 195 Reversed in (28) A I R 1941 P C 90.
- Manubhai Chunilal v. General Accident Fire and Life Assurance Corporation Ltd., (1936) 60 Bom 1027=38 Bom L R 632=(23) AIR 1936 Bom 363 = 165 I C 672 Overruled in (28) A I R 1941 P C 6.
- Nawab v. Mt. Subhani, (1937) 39 P L R 566 = (24) AIR 1937 Lah 688 = 172 I C 158 Reversed in (28) A I R 1941 P C 21.
- Srish Chandra Nandi v. Rakhalananda Thakur, (1937) 41 C W N 1108=65 C L J 520 Reversed in (28) A I R 1941 P C 16.
- Urmila Debi v. Baidya Nathjee, (1938) 19 P L T 367 = 4 B R 692 = (20) A I R 1938 Pat 273=176 I C 209 Reversed in (28) AIR 1941 P C 180.
- Visvanathan Chettiar v. Ramanathan Chettiar, (1937) 46 M L W 275 = 1937 M W N 913=(1937) 2 M L J 559 = (24) AIR 1937 Mad 816=176 I C 1003 Reversed in (28) A I R 1941 P C 43.
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THE ALL INDIA REPORTER 1941 PRIVY COUNCIL



* A. I. R. 1941 Privy Council 1

(From Madras: A. I. R. 1938 Mad 999)

17th September 1940

VISCOUNT MAUGHAM, LORD RUSSELL OF
KILLOWEN, LORD WRIGHT, SIR GEORGE
RANKIN AND MR. M. R. JAYAKAR

O. Rm. O. M. Sp. Firm — Appellant

v.

P. L. N. K. M. Nagappa Chettiar and
another — Respondents.

Privy Council Appeal No. 67 of 1939.

* (a) *Banker and Customer*—A having account with bank drawing hundis for certain amount to be applied to charity by him and B and handing over hundis to B with authority to invest trust funds in his own business—Hundis though payable to bearer headed with name of charity—Bank crediting amount to account in name of charity — Subsequently bank closing charity account and transferring trust funds to itself thereby cancelling over-draft account of B with it—B on same date opening new account in his business books in name of charity for amount of hundis—Bank held guilty of appropriating trust monies with knowledge of breach of trust and liable to restore monies to charity.

A who had an account with a bank drew hundis for a certain amount which was to be applied to charity by him and B and handed over the hundis to B authorizing him to invest the trust funds in his own business. The hundis though payable to bearer were headed with the name of the charity concerned. The hundis were duly presented by B to the bank which acknowledging the receipt of money due thereunder credited the same to an account in the name of charity concerned though B had an account of his own with the bank. Subsequently the bank closed the account in the name of the charity and transferred the monies to the credit of B's account and then to itself thereby cancelling an over-draft of B who on the same date opened a new account in his business books in the name of the charity for the amount for which the hundis were given:

1941 K/1a

Held that the bank in appropriating the charity monies to itself was taking a transfer of property which in equity it was bound to restore to the charity unless it could show that B had authority to use those funds to pay off his over-draft and that the appropriation by it was not a breach of trust. The question whether the transfer was due more to B's desire to put his account in credit or to the bank's desire to be repaid was immaterial. Though a Hindu religious endowment was not technically for all purposes in the same position as an English trust and its property was not vested in its manager as trust property is vested in a trustee, such differences were of small importance for the purposes of the case. [P 301]

Held further that the discharge of the overdraft on B's account did not come within the scope or intention of any authority given by A to B "to invest the trust funds in his own business" and therefore the bank was liable to restore the monies to the charity in as much as it took the trust monies by a transaction with B which was a breach of trust on his part and with notice that it was a breach of trust. [P 501]

* (b) *Trusts* — Suit by trustee against stranger to recover trust funds applied in breach of trust falls under Art. 120 and not Art. 36, Limitation Act — Right to sue accrues when trustee becomes aware of breach.

A suit by a trustee against a stranger to recover trust funds which have been applied in breach of trust falls under Art. 120 and not under Art. 36, Limitation Act. The right to sue accrues when the trustee becomes aware of the breach: A I R 1918 Mad 76; A I R 1928 Mad 887; A I R 1931 Lah 70; A I R 1936 Pat 231 and A I R 1930 Mad 173, *Approved*; A I R 1930 P O 270, *Ref.*

[P 601]

* (c) *Civil P. C. (1908), S. 92*—Suit by trustee against stranger to recover trust property—S. 92 does not apply.

The consent of the Advocate-General under S. 92 is not necessary in order that a trustee may recover trust property in the hands of a stranger to the trust.

[P 601]

(d) *Trusts*—Suit by trustee to recover trust property—Question of accounts cannot be raised for the first time in Privy Council appeal.

In a suit by a trustee to recover trust property a prayer for accounts of the trust property cannot be asked for in the Privy Council appeal for the first time. [P 6 C 1]

Sir H. Cunliffe and W. Wallach —

for Appellant.

S. P. Khambatta — for Respondent 1.

Sir George Rankin.—This appeal arises out of a suit filed on the original side of the High Court at Madras on 29th April 1933, and is brought from the decree of an appellate Bench dated 9th May 1938,* reversing a decision of Lakshmana Rao J. dated 27th March 1936, whereby the suit had been dismissed. All the parties to the suit are Nattukottai Chettiars. The appellant is a firm which is known by the letters O. RM. O. M. SP., and which carries on business at Madras as bankers and money-lenders. It was defendant 1 to the suit and it will be conveniently referred to as the appellant bank. The plaintiff Nagappa and his younger brother Lakshmanan were the sons of one Minakshisundaram, whose brother Subrahmanyam, though not an original defendant, was added as defendant 2 to the suit by an order dated 24th January 1934. They were members of a joint Hindu family and had a family business in "piece-goods" (cloth) at Madras and other places—the plaintiff's father's share being 10 annas and Subrahmanyam's 6 annas. After the death of the plaintiff's father in 1914 a partition of the assets of business was effected with the aid of certain business friends and the terms of this arrangement were embodied in a yadast or note dated 17th January 1916, which the plaintiff signed on behalf of himself and his brother, who was then a minor. The main term was that the business should be taken over in its entirety by Subrahmanyam.

It appears that the plaintiff's father had been interested in two religious charities, one for the supply of water to worshippers at a certain place in the hills, and one for the supply of cloth for the purposes of a temple. Before the partition a sum of Rs. 2000 had been credited in the books of the business to the temple and it was arranged at the time of the partition that the two branches of the family should provide in all a capital of Rs. 10,000 for each of these two charities. The shares in which they were to provide the money were five-eighths and three-eighths—i. e., 10 annas and 6 annas, according to their shares in the business. As Rs. 2000 had already been provided for the temple, the plaintiff's branch had to find Rs. 5000 for that and Rs. 6250 for the water

charity. The yadast by cl. 13 thereof provided that both branches of the family should manage and conduct the charities. Acting upon this arrangement the plaintiff drew and handed to his uncle, Subrahmanyam, two hundis, each dated 1st December 1916, for the money which his branch had agreed to find—that is for Rs. 5000 and Rs. 6250 respectively with interest at the Madras nadappu rate from 17th January 1916, the date of the yadast. The plaintiff had a banking account with the appellant firm and the hundis were drawn on that firm. Though made payable to bearer they were headed with the name of the charity concerned under the word "credit"—that is, showing the charity as the party or account in whose favour they were intended.

It is not necessary that the terms of the hundis should be here set out. They were taken by Subrahmanyam to the appellant bank and on 11th September 1917, the bank endorsed each with a statement that the amount with interest to date had been received. It is admitted that the bank credited these sums in each case to an account in the name of the charity concerned, though Subrahmanyam had had an account with the appellant bank since 6th January 1917. The monies remained at the credit of the charities with the appellant-firm until 10th February 1920, by which time they amounted in all to Rs. 15,732-15-9. On that date they were transferred to the credit of Subrahmanyam's account and the accounts in the name of the charities were closed. The transaction is clearly and simply described in the case of the appellant bank as follows: A book entry of Rs. 15,700 was made in favour of the appellant bank thereby cancelling an overdraft of Subrahmanyam in the books of the appellant bank and the balance of Rs. 32-15-9 was paid to Subrahmanyam in cash. At the same time Subrahmanyam in his own books in his money-lending business opened new accounts in the names of the two charities—that is Rs. 8740-8-9 in favour of one and Rs. 6992-7-0 in favour of the other charity.

To challenge this transaction is the purpose of the present suit. The plaintiff seeks to make the appellant bank liable to refund to the charities the money received by it in reduction of Subrahmanyam's overdraft on the footing that this application of the money was a breach of trust on the part of Subrahmanyam of which the appellant bank had notice and by which the appellant bank has profited. Some evidence was given by a

* Reported in ('38) A I R 1938 Mad 999.

witness on behalf of the appellant bank to the effect that when Subrahmanyam first handed over the hundis and opened the two accounts in the name of the charities he had intimated "I shall take it whenever I want." Their Lordships regard this evidence as unreliable. The witness also deposed that at the time of the transfer of the monies on 10th February 1920, cash was actually borrowed from Marwaris, was paid to one Chidambaram on behalf of Subrahmanyam, repaid to the bank by him and repaid to the Marwaris by the bank on the same day. Their Lordships regard these statements as untrue and they are here mentioned only to be put aside.

Admittedly, the substantial effect of the transaction of 10th February 1920, was to empty the charity accounts and to cancel Subrahmanyam's overdraft. Though a Hindu religious endowment is not technically for all purposes in the same position as an English trust and its property is not vested in its manager as trust property is vested in a trustee, such differences are of small importance for the purposes of the present case. (1868) L R 3 H L 1¹ and (1897) L R 2 Ch 243² were cited at the bar, but their Lordships do not consider that an examination of the case law is required to show that the appellant bank in appropriating the charity moneys to itself was taking a transfer of property which in equity it would be bound to restore to the charities unless it could show that Subrahmanyam had authority to use these funds to pay off his overdraft. In that event no doubt the transfer which seemed on its face to be highly improper would turn out to be justified. Their Lordships will assume that if the transfer was within Subrahmanyam's authority, the appellant bank would not be liable to restore the money by reason merely that Subrahmanyam in exercising his authority had failed to pay due regard to the interests of the charities. But the appellant bank on the facts of this case is without defence upon the merits unless it first establishes that the transfer was within the authority of Subrahmanyam and not a breach of trust by him. It avails nothing to dispute whether the transfer was due more to Subrahmanyam's desire to put his account in credit or to the bank's desire to be repaid.

1. (1868) L R 3 H L 1 : 16 W R 842, *Gray v. Johnston*.

2. (1897) L R 2 Ch 243 : 66 L J Ch 564 : 76 L T 684 : 45 W R 616, *Coleman v. Bucks & Oxon Union Bank*.

It is said that Subrahmanyam had received from the plaintiff authority to do what he did. Upon this question and upon the question of limitation — in their Lordships' opinion the only substantial questions in this case — it is necessary to notice some events which took place after the transfer had been made. Subrahmanyam's account with the appellant bank is in evidence and while it shows a credit balance of Rs. 4500 in May 1920, it continues thereafter to be in debit the balances as struck rising in 1920 to Rs. 60,000, in April 1921 to Rs. 1,12,680 and continuing throughout the rest of that year in the neighbourhood of half a lac. In 1924 the charities were no longer being kept up and before the end of 1925 an insolvency petition was presented in the High Court which resulted in Subrahmanyam being adjudicated insolvent on 4th January 1926. It appears that he had engaged in speculative purchases of immovable property involving considerable sums.

In 1924 the plaintiff came to know that the funds were no longer in deposit with the appellant bank and on 1st March of that year a letter written on the plaintiff's behalf by an advocate claimed from Subrahmanyam the amount of the hundis with interest as having been deposited by the plaintiff and his younger brother in Subrahmanyam's firm for the purposes of the charities at the nadappu rate of interest. This allegation was repeated incidentally in a plaint dated 25th April 1924 (C. S. No. 328 of 1924) filed in the Madras High Court with reference to Subrahmanyam's collections from the branches of the joint family business which had been partitioned by the yadast of 17th January 1916. Again in 1929 the plaintiff took steps in the insolvency to have it declared that the monies now in question did not pass to the official assignee as part of the estate of Subrahmanyam but were trust monies. He brought a motion to obtain a declaration to that effect on the footing that Subrahmanyam had withdrawn the monies from the appellant bank and it is clear enough that this proceeding was taken and maintained upon the basis that Subrahmanyam had been authorized to withdraw them. The motion failed on the ground (*inter alia*) that there were no assets left at the time of the insolvency which could be traced to the monies which had been withdrawn from the appellant bank. It is stated in the judgment of the learned Chief Justice in the present case that the plaintiff came to know in 1929 of the fact that the monies

were not really withdrawn from the appellant bank in 1920 but were taken by the appellant bank in cancellation of Subrahmanyam's overdraft so that the funds had disappeared altogether.

The case made by the plaintiff in his pleading and by his own evidence in the present suit was different from his previous statements. It was to the effect that at the time the charitable funds were constituted in 1916 it was agreed that they should be invested with a third party and not with Subrahmanyam; and that Subrahmanyam should not vary the investment without the plaintiff's consent. The learned trial Judge in view of the letter of 1st March 1924, which the plaintiff endeavoured to repudiate as a misinterpretation of his instructions to his advocate, disbelieved this part of the plaintiff's evidence and came to the following conclusion :

Under the circumstances it cannot reasonably be doubted that (Subrahmanyam) was authorized to invest the trust funds in his own business in consideration of his paying nadappu interest and the amount in question was on the same day—i. e., 10th February 1920, credited by him in the accounts of the dharmams in his books. The result of the transaction on either supposition would be to transfer the trust money to the business of (Subrahmanyam) and he was acting within his rights in doing so.

The finding of fact as to the authority given to Subrahmanyam contrary though it was to the plaintiff's evidence, was not contested before the learned Chief Justice and Krishnaswami Ayyangar J. on appeal. The Chief Justice states :

The trust funds were created and it is admitted that respondent 2 (Subrahmanyam) being the uncle of the appellant (plaintiff) and much older was given the management of them. It is also admitted that respondent 2 (Subrahmanyam) was given the right of investing the trust funds in his own business if he so decided.

But the appellate Bench did not consider that Subrahmanyam had acted within his authority :

There could be no investment of the trust monies in (Subrahmanyam's) business unless they were replaced. They were not replaced and therefore there was no investment. Respondent 1 (that is the appellant bank) was not entitled to do what he did without being satisfied that the entries in (Subrahmanyam's) books were going to be supported by cash. He took no steps to satisfy himself that this would be done. On the other hand he applied the trust monies for his own benefit knowing full well that (Subrahmanyam) was merely intending to constitute himself a debtor to the trusts.

'To invest the trust funds in his own business' is a phrase which stands in need of some interpretation and it is possible that the trial Judge may have taken it too

broadly and that the appellate Bench may have taken it too narrowly. The burden of proving the nature and extent of the authority is on the appellant bank and the fact that the plaintiff's evidence was not believed does not necessarily imply that the statements previously made by him in the letter of 1st March 1924, the suit of 1924 and the insolvency proceedings of 1929 can be accepted. Subrahmanyam was not called nor was his absence from the witness-box explained. The result is that there is no direct and reliable evidence as to what was said by the plaintiff or his uncle on the subject of investment. It is to be inferred that the authority relied upon is an authority given by the plaintiff at the time of handing over the hundis in 1916 or 1917—while he still bore the character of settlor and the endowment was not yet perfected. The trusts having arisen in connexion with the family piece-goods business, it is not very difficult to suppose that Subrahmanyam who was to carry it on after the partition might be authorized to use the money in that business. It is a common practice among Chettiars to carry sums in their books to the credit of a charity without intending that the money should be set apart or taken out of the business. The present was a case in which the money was the money of the plaintiff and his brother and the business was to be their uncle's, but this may not have been regarded as calling for a stricter system. Any wider authority to deal with the monies, even if alleged to have been given to the uncle, must however be established by the strictest proof.

To arrive at a correct interpretation of the arrangement made, and to ascertain whether it covered what was done by Subrahmanyam in February 1920, it is important to know what businesses he was engaged in at the time of the arrangement and to ascertain the character of the account into which the money went. In addition to continuing the piece-goods business and collecting the assets of certain shops which are mentioned in the yadast, Subrahmanyam seems in 1917 to have done business of some sort at Penang. Whether his speculations in immovable property had then begun it is not possible on the evidence to ascertain, though it appears in evidence that one large transaction of this character took place in May 1920. An account with the appellant bank called the "go-down" account was opened by Subrahmanyam in January 1917, and would appear to have had reference to the piece-goods business. At some date before March 1918,

he began a money-lending business in Coral Merchant Street and in that month an account was opened with the appellant bank called the account of the "street shop" in connexion with this business. The "go-down" account was closed in April 1919, by a transfer to the "street shop" account of Rs. 4401. From that date the latter account can only be described as Subrahmanyam's "private account" to use the words of the Chief Justice, or as the appellant bank's written statement calls it "his personal ledger in the defendant firm." It is this account which was overdrawn in February 1920, and into which the charity money was paid, and it was in the books of the money-lending business or "street shop" that Subrahmanyam made credit entries in favour of the charities and debited the bank's account. What other books of account were kept by him does not appear.

It is not possible on the evidence to ascertain that the overdraft outstanding on 10th February 1920 had been incurred on account of the piece-goods business or the money-lending business or any other business in particular: still less can it be said that any particular business got the benefit of the charity money. Unless it can be held that the plaintiff at the time of handing over the hundis authorized his uncle to borrow the money and use it as he chose—whether for buying property, lending money, dealing in piece-goods or any other business purpose, the appellant bank has not shown the authority of Subrahmanyam to make the transfer of 10th February 1920. The learned Chief Justice may have gone too far if his language was intended to exclude all possibility of investing money in a business by paying off a liability of the business. It would not be impossible to put a case in which a business in need of new stock or having occasion to acquire new premises paid for its requirements in the first instance by means of an overdraft. In such a case, a stranger finding money to discharge the overdraft might without difficulty be said to be investing money in the business. Their Lordships are not construing a document or even arriving at the terms of an oral bargain spoken to by reliable witnesses but are in the position of arriving at the facts of the case in the light of an admission made in the appellate Court; and they find it impossible to be satisfied that the discharge of an overdraft on this particular account comes within the scope or intention of any authority given by the plaintiff "to invest the trust funds in his

own business." The disappearance of the money into this account would not among ordinary business men be deemed an "investment" of the money and the appellant bank has not succeeded in showing that Subrahmanyam in February 1920, acted within any authority given to him when the hundis were handed over.

The question of limitation has next to be considered. The claim against the appellant bank is not that a breach of trust was committed by it but that it took the trust property by a transaction with Subrahmanyam which was a breach of trust on his part and with notice that it was a breach of trust. Their Lordships are of opinion that Art. 36, Limitation Act, does not apply to the case and that it comes under Art. 120 which prescribes a period of six years from the time "when the right to sue accrues." The question is whether time began to run from 10th February 1920, or from the date in 1929 when the plaintiff came to know that the money of the charities was set off against Subrahmanyam's debt to the appellant bank upon his overdraft. The suit having being brought in 1933 it is necessary for the plaintiff to be able to calculate the time from the later date. The language of Art. 120 makes no reference to the knowledge of the plaintiff and is in this respect in contrast with that of other articles, *e. g.*, 90, 91, 92, 95, 96, 114. On the other hand, it was recognized by the Board in 57 I A 325³, that an infringement of the plaintiff's right or at least a clear and unequivocal threat to infringe it is necessary before time begins to run against the plaintiff under the article.

The Appellate Bench acted upon a principle which has been accepted as applicable to this article in a number of cases in several of the High Courts: 44 I C 551;⁴ A I R 1928 Mad 837;⁵ 13 Lah 262;⁶ 14 Pat 824;⁷ A I R 1930 Mad 173.⁸ In the last mentioned case it was said that in cases in which the relief is sought on the ground of fraud, misconduct, mistake, etc., it would appear that limitation is made

3. ('30) 17 A I R 1930 P C 270 : 127 I C 737 : 11 Lah 657 : 57 I A 325 (P O), *Mt. Bolo v. Mt. Koklan*.

4. ('18) 5 AIR 1918 Mad 76 : 44 I C 551, *Venkateswara Ayyar v. Somasundaram Chettiar*.

5. ('28) 15 AIR 1928 Mad 837 : 112 I C 22, *Viswanadham v. Narayana Dass*.

6. ('31) 18 AIR 1931 Lah 70 : 130 I C 778 : 12 Lah 262 : 31 P L R 1014, *Lal Singh v. Jai Chand*.

7. ('36) 28 AIR 1936 Pat 231 : 162 I C 235 : 14 Pat 824 : 16 P L T 484, *Mathura Singh v. Rama Rudra Prasad*.

8. ('30) 17 AIR 1930 Mad 173 : 120 I C 330 : 58 M L J 349, *Basavayya v. Bapana Rao Sowcar*.

to commence from the time when the fraud, misconduct or mistake becomes known to the plaintiff. Such Articles as 90, 91, 92, 95 and 96 were mentioned by way of illustration of this principle, and it was considered that Art. 120 being an omnibus one, the general expression employed in Col. 3 is necessitated by the variety of suits coming within its purview, in some only of which would fraud, misconduct or mistake be part of the cause of action. It was accordingly held that it would be in consonance with the scheme of the Act if the right to sue should be deemed to accrue under Art. 120 from the time of the plaintiff's knowledge of the fraud, misconduct or mistake where such a ground was the basis of the suit. Their Lordships can see some difficulties in this reasoning as a matter of interpretation of the language of the statute and had the matter been res integra they are not certain that this interpretation would have prevailed with them. But the decisions in India have established a rule of limitation under Art. 120 by which the plaintiff in the cases to which the rule applies cannot be debarred of his remedy unless with knowledge of his rights he has been guilty of delay. The decisions which have been referred to were given in cases where the plaintiff sought to set aside a decree passed against him when a minor owing to the negligence of his guardian, or a mortgage of property which belonged not to the mortgagor but to a temple, or a transfer by a debtor to defeat his creditors. The subject-matter of the present suit is somewhat different but their Lordships are prepared to follow the principle of the Indian decisions in the present case and to hold that the suit is within time.

It was suggested in the course of argument that the suit should only have been brought with the consent of the Advocate-General under S. 92, Civil P. C., but their Lordships think it clear that no such consent is necessary in order that a trustee may recover trust property in the hands of a stranger to the trust. It was also contended that an account should have been taken as to the monies expended by Subrahmanyam upon the charities up to the year 1924 after which he seems to have neglected them; but, as no such point appears to have been taken in the High Court, their Lordships do not think right to direct any such account. They will humbly advise His Majesty that the appeal should be dismissed. Respondent 1 entered an appearance but no case was lodged for any of the respondents.

Respondent 1 will get from the appellant firm such costs as he has incurred.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellant — Hy. S. L. Polak & Co.
Solicitors for Respondent 1 — T. L. Wilson & Co.

*** * A. I. R. 1941 Privy Council 6**

(From Bombay)

17th September 1940

VISCOUNT MAUGHAM, LORD RUSSELL OF KILLOWEN, LORD WRIGHT, SIR GEORGE RANKIN AND MR. M. R. JAYAKAR.

General Accident Fire & Life Assurance Corporation Ltd. — Appellant

v.

Janmahomed Abdul Rahim —

Respondent.

Privy Council Appeal No. 43 of 1939.

(a) *Limitation Act (1908)* — Act must be enforced even at risk of hardship to particular party.

Limitation Act ought to receive such a construction as the language in its plain meaning imports. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it: 36 Cal 1008 (P O), Rel. on. [P 9 C 1]

* (b) *Limitation Act (1908), Art. 68* — Suit to enforce bond by person to whom it is assigned under S. 292, Succession Act, is suit upon bond.

A suit to enforce the bond by a person to whom it has been assigned under S. 292, Succession Act, is a suit upon a bond within the meaning of Art. 68, Limitation Act. [P 9 C 2]

** (c) *Limitation Act (1908), Art. 68* — Letters of administration granted to widow of deceased for benefit of minor sons and limited to period of minority of any of them — Administration bond under S. 291, Succession Act, furnished — Widow dying — Bond assigned under S. 292, Succession Act, to one of sons after he had attained majority — Suit on bond brought more than three years after death of widow held barred: 60 Bom 1027 = A I R 1936 Bom 363 = 165 I C 672, OVERRULED.

After the death of the deceased, letters of administration were granted to his widow for the benefit of minor sons and limited to the period of minority of any of them. The usual administration bond under S. 291, Succession Act, was furnished. The administratrix afterwards died and on attaining the majority by one of the sons the bond was assigned to him under S. 292, Succession Act. The assignee brought a suit on the bond within three years of the attaining majority but more than three years after the death of the administratrix:

Held that it could not be said that the condition was not broken within the meaning of Art. 68 until the plaintiff attained his majority which was less than three years before the suit was filed. It was impossible to suggest that the condition of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason

of the death of the administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is, more than three years prior to the suit. The suit was therefore barred: 60 Bom 1027 = A I R 1936 Bom 363 = 165 I C 672, *OVERRULED*; view of Blackwell J., in A I R 1936 Bom 363, *Approved*. [P 10 C 1]

**(d) Succession Act (1925), S. 292—S. 292 does not confer new cause of action on assignee: 60 Bom 1027 = A I R 1936 Bom 363 = 165 I C 672, OVERRULED.*

Section 292 has not the effect of conferring a new cause of action on the assignee and therefore it cannot be said that the condition of the bond is not broken for the purposes of the Limitation Act until the date of assignment: A I R 1924 Rang 68 and view of Blackwell J., in A I R 1936 Bom 363, *Appr.*; 60 Bom 1027 = A I R 1936 Bom 363 = 165 I C 672, *OVERRULED*. [P 10 C 1, 2]

Sir Thomas Strangman and W. W. K. Page —
for Appellant.

D. N. Pritt and S. P. Khambatta —
for Respondent.

Viscount Maugham — There are here two consolidated appeals from a judgment and decree of the High Court of Judicature at Bombay in its appellate jurisdiction dated 31st March 1938, confirming with a variation a judgment and decree of that Court in its ordinary original civil jurisdiction. The facts are very complex and the questions raised on the appeals are questions of considerable importance. The appellants however who are the defendants in the suit, besides disputing liability on a number of grounds, have raised the contention that the suit was barred by Art. 68, Limitation Act, (9 of 1908). This question was based on substantial grounds and their Lordships thought it right to hear the arguments of both sides upon it before embarking on the other questions raised on the appeal and the cross-appeal; and in the result they have come to the conclusion that the point of limitation raised by the appellants is well-founded and accordingly it has not been necessary for them to go into the other matters above referred to. In order to deal with the question of limitation it is necessary to state the following facts:

On 18th September 1924, Abdul Rahim died intestate at Bombay leaving him surviving a widow, Hawabai, three sons and three unmarried daughters. All his children were then minors. According to the law by which he was governed, his three infant sons became entitled to his estate in equal shares subject to the right of his widow to maintenance pending re-marriage or death, and to the rights of his daughters to maintenance until marriage or death, and to their marriage expenses. On 17th March 1925, the widow of Abdul Rahim (Hawabai), having been duly empowered by the High

Court, filed a petition in the High Court for the grant to her of letters of administration to the estate of her deceased husband for the use and benefit of his three minor sons and limited to the period of minority of any of them. It was stated in the schedule to the petition that the moveable and immovable properties of Abdul Rahim were valued at Rs. 2,75,791 and for the purposes of probate duty the estate was valued at Rs. 1,99,025 after deducting funeral expenses and debts. On 6th May 1925 it was ordered that on the sureties being justified for the whole of the estate of Abdul Rahim and on filing the necessary administration bond, and on payment of fees and stamp duty, letters of administration should issue as prayed to Hawabai. On 14th May 1925, Hawabai and the present appellants as sureties executed a bond for Rs. 3,98,000 in favour of the Registrar of the High Court in its testamentary and intestate jurisdiction and the head assistant to the Prothonotary and Registrar of the Court. The conditions of the bond were in the usual form. The obligation was to be void and of no effect if Hawabai,

(1) should make or cause to be made a true and perfect inventory of the property and credits of the deceased which had or should come to her hand, possession or knowledge or to the hands or possession of any other person or persons for her and should exhibit or cause to be exhibited to the High Court such inventory on or before 14th November 1925;

(2) should well and truly administer such property and credits according to law;

(3) should make or cause to be made a true and just account of her administration on or before 14th May 1926; and

(4) all the rest and residue of the property and credits which should be found remaining upon the said account after being first examined and allowed by the High Court should deliver and pay unto such person or persons as shall be lawfully entitled to such residue.

On 9th June 1925 the letters of administration were duly issued to Hawabai on behalf of the three minor sons of the intestate for their use and benefit until one of them should attain his majority. It is alleged by the plaint that on 2nd July 1925, Hawabai, who was a purdanashin lady, and illiterate, appointed one Bhatra who was related to her, being the son of her maternal uncle, her attorney to act for her in all matters relating to the estate of Abdul Rahim. This person, however, misapplied the property and subsequently (on 22nd October 1928) committed suicide. Hawabai commenced various proceedings in an endeavour to recover the property forming part of the estate of Abdul Rahim, but on 27th

April 1929 she died. On 14th November 1931 the eldest son of Abdul Rahim, Janmahomed Abdul Rahim (who will be called "the plaintiff") attained his majority.

On 24th March 1932 an order was made by the High Court that the Court should assign the administration bond to the plaintiff, his heirs, executors or administrators, and it was further ordered that on such assignment the plaintiff, his heirs, executors or administrators should be entitled to sue on the bond in his or their name or names as if the same had been originally given to him or them, and should be entitled to recover thereon as trustee or trustees for all persons interested the full amount recoverable in respect of any breach thereof. By a deed of assignment dated 14th August 1932 certain officers of the Court appointed for that purpose by an order of the Chief Justice purported to assign the bond to the plaintiff (the present respondent) "to hold the same unto the assignee absolutely with all such powers, rights and remedies as are now subsisting thereon." The assignment was effected under S. 292, Succession Act of 1925, which is in these terms :

The Court may, on application made by petition and on being satisfied that the engagement of any such bond has not been kept, and upon such terms as to security, or providing that the money received be paid into Court or otherwise, as the Court may think fit, assign the same to some person, his executors or administrators, who shall thereupon be entitled to sue on the said bond in his or their own name or names as if the same had been originally given to him or them instead of to the Judge of the Court, and shall be entitled to recover thereon, as trustees for all persons interested, the full amount recoverable in respect of any breach thereof.

It should be added that under S. 291 every person to whom any grant of letters of administration, with an exception not material to the present purpose, is committed must give a bond to the District Judge with one or more surety or sureties engaging in the due collection and administration of the estate of the deceased. The bond is in the usual form. It is the usual practice in such a case to apply S. 292 and to cause the bond to be assigned to the intending plaintiff. It does not appear to be necessary to discuss the older practice under the Letters Patent of 1823, founding the Supreme Court of Bombay. On 2nd November 1932 the plaintiff (respondent) filed the present suit claiming from the defendants, the present appellants, the sum of Rs. 3,98,060, or such lesser sum as represents the loss of the estate of Abdul Rahim due to the failure of

Hawabai as administratrix of that estate to carry out her obligations under the administration bond. The plaint alleged four specific breaches of duty by the administratrix which can be shortly stated as follows : (1) the appointment of Bhatra as her attorney to manage the estate of the intestate; (2) allowing the sum of Rs. 50,003 shown in the inventory and accounts filed by her on 2nd June 1927, as being in her hands on that date to remain in the hands of Bhatra; (3) the failure to realize a certain share of the intestate in the estate of his deceased father and allowing such share to remain in the hands of Bhatra; and (4) the failure to hand over to the Accountant-General of Bombay the estate of Abdul Rahim, all his heirs being minors.

The learned trial Judge and the appellate Court (Sir John Beaumont C. J., and Kania J.) in the course of their judgments held that on the question of limitation they were bound by the decision of the appellate Court of Bombay in 60 Bom 1027.¹ That case related to a similar bond, similarly assigned, and the appellate Court, Sir John Beaumont C. J., and Rangnekar J., overruling Blackwell J., decided that the defence of limitation under Art. 68, Limitation Act, was not available. In that case as in the present the beneficiaries at the date of the grant of letters of administration were infants, and in other respects the facts are not distinguishable from those in the present case. The question, therefore, arises whether the decision in 60 Bom 1027¹ is or is not correct. Article 68, Limitation Act, 1908, is one of a series of 183 articles in a schedule which relate to the limitation of suits, appeals and applications. The articles are introduced by S. 3 in the following words:

Subject to the provisions contained in Ss. 4 to 25 (inclusive), every suit instituted, appeal preferred, and application made after the period of limitation prescribed therefor by Sch. 1 shall be dismissed, although limitation has not been set up as a defence.

The provision contained in Art. 68 is to the following effect :

"On a bond subject to a condition," the period of limitation is to be three years and the time from which the period begins to run is stated to be "when the condition is broken".

Article 120 is stated to relate to any suit "for which no period of limitation is provided elsewhere in this schedule." The period of limitation is in that case six years

1. ('36) 23 AIR 1936 Bom 363 : 165 I C 672 : 60 Bom 1027 : 38 Bom L R 632, Manubhai Chunilal v. General Accident Fire and Life Assurance Corporation Ltd.

and the time from which the period begins to run is "when the right to sue accrues." The word "bond" is defined in S. 2 (3). The word is stated to include

any instrument whereby a person obliges himself to pay money to another, on condition that the obligation shall be void if a specified act is performed, or is not performed, as the case may be.

It is not in dispute that the bond in this case is a bond within the terms of that definition, and it is clear that Art. 120 has no application if Art. 68 applies to the present case. It may be added that S. 6 of the Act (which deals with suits by infants) clearly has no application. Before considering the grounds on which the High Court in 60 Bom 1027¹ came to the conclusion above referred to it may be desirable to point out that a Limitation Act ought to receive such a construction as the language in its plain meaning imports. See the decision of this Board in 36 I A 148.² As was well stated by Mr. Mitra in his Tagore Law Lectures, Edn. 6 (1932) (Vol. I, p. 256):

A law of limitation and prescription may appear to operate harshly or unjustly in particular cases, but where such law has been adopted by the state it must if unambiguous be applied with stringency. The rule must be enforced even at the risk of hardship to a particular party. The Judge cannot on equitable grounds enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it.

Very little reflection is necessary to show that great hardship may occasionally be caused by statutes of limitation in cases of poverty, distress and ignorance of rights; yet the statutory rules must be enforced according to their ordinary meaning in these and in other like cases. Their Lordships think it is possible that sympathy for the plaintiff in the case which must now be considered was allowed to affect a pure question of construction. In the present case, however, it may be observed that an administration bond is as often assigned when persons of full age are concerned as when the beneficiaries are all of them infants and that such a bond is of the nature of an additional security taken by the Court for the benefit of the beneficiaries. If a right of action under the bond become statute barred by the operation of Art. 68, Limitation Act, that does not affect the rights of the beneficiaries against the administrator. While making these observations their Lordships think it right to repeat that mere considerations of hardship in such a case should not be taken into account.

2. ('09) 36 Cal 1003 : 4 I C 449 : 36 I A 148 : 10 C L J 284 : 14 C W N 1 (P O), Abhiram Goswami v. Shyama Charan Nandi.

In 60 Bom 1027¹ Blackwell J. took the view that the bond being within the definition in the Limitation Act and the action being on a bond subject to a condition, time began to run from the last date on which the condition was broken and no action could therefore be brought after the expiration of three years. In coming to this conclusion, he followed the decision of the appellate Court of Rangoon in 1 Rang 463.³ Blackwell J., in an admirable judgment dealt with the effect of an assignment of a bond under S. 292, Succession Act, and observed that in his opinion such an assignment merely deals with the question of title and confers upon the assignee a right to sue which he would otherwise not have had previously to the assignment, and that the section thus merely entitles the assignee to recover as a trustee for all persons interested the full amount recoverable under the bond in respect of any breach of it. On appeal, it was not doubted that the bond was a bond upon a condition, but, the Court held that a suit to enforce the bond by a person to whom it has been assigned under S. 292 was not a suit upon a bond within the meaning of the article, because, it was said, the assignment confers substantive rights upon the assignee.

Their Lordships, with all respect, are unable to follow this argument, nor can they agree that there is any difficulty as regards the consideration for the assignment. It is of course true that a suit by the assignee of such a bond is a suit by a person who derives title from the assignment which is authorized by the terms of S. 292, Succession Act, 1925; but their Lordships are unable to see how this can be held to show that the action on the bond by the assignee is not a suit on a bond subject to a condition. Every valid assignment of a bond confers substantive rights upon the assignee, but those rights are not, in any case, suggested to their Lordships, greater than the rights possessed by the assignor. It may be noted that the ordinary security bond which is given by receivers in India under the provisions of the Code of Civil Procedure, O. 40, R. 3, is given to an officer of the Court (see App. F, Form No. 10), yet it has never been suggested that a suit upon such a bond, if brought by an assignee, is in any way different from an ordinary suit by the holder of a bond, the condition of which has been broken.

3. ('24) 11 A I R 1924 Rang 68 : 76 I C 802 : 1 Rang 463, Maung San U v. Maung Kyaw Mye.

There were two other grounds for the conclusion of the Court. First it was held that, assuming that Art. 68 applied to the case, it was impossible to say that the condition was broken until some person who was able to give a valid discharge for the estate claimed it from the administrator or his representatives and failed to obtain it. The consequence of that view was said to be that the condition was not broken within the meaning of Art. 68 until the plaintiff attained his majority which was less than three years before the suit was filed. In other words, the death of the administrator was held not to put an end to his liability as regards future events. Their Lordships cannot agree. An administrator of an intestate is merely the officer of the Court in whom the deceased himself has reposed no trust. On the death of the former the estate of the intestate does not pass to his heirs or representatives and no authority whatever can be transmitted by him, nor has anyone claiming under him any right to interfere with or to complete the administration of the property of the intestate. The office comes to an end on death (if not before) and the course which should be taken when an administrator dies is to obtain a grant of administration *de bonis non* and the person to whom such grant is made will be entitled to take possession of the property.

It therefore seems to their Lordships impossible to hold that the administratrix in the present case could possibly have been guilty of any default or misconduct in relation to the administration after the date of her death, though of course her representatives would continue liable in respect of any such default or misconduct committed by her during her lifetime. It seems equally impossible to suggest that the condition of the bond could be broken by the administratrix by the default of some person in relation to the estate of the intestate after the original letters of administration had ceased to have any operation by reason of the death of the administratrix. The condition of the bond according to its terms was therefore broken at the latest on her death, that is more than three years prior to the suit.

The other and perhaps the main ground for the conclusion of the Court in 60 Bom 1027¹ was that S. 292, Succession Act, had the effect of conferring a new cause of action on the assignee and therefore provided a fresh starting point for the purposes of limitation. If the language of S. 292, Succession

Act, be examined it is difficult to suppose that the draftsman intended to provide for the creation of a new cause of action upon the assignment of a bond thereunder. The essential words are taken verbatim from S. 83, (English) Court of Probate Act, 1857, (20 and 21 Vict. C. 77) which provides that the Court may on being satisfied that the condition of any such bond has been broken, order one of the Registrars of the Court to assign the same to some person and such person . . . shall thereupon be entitled to sue on the said bond in his own name . . . as if the same had been originally given to him instead of to the Judge of the Court and shall be entitled to recover thereon as trustee for all persons interested the full amount recoverable in respect of any breach of the condition of the said bond.

(The modern provision to the same effect is to be found in S. 167, Judicature Act, 1925.) It has never been suggested that under either of these sections there is upon the assignment being made a fresh cause of action. The origin of the ancient practice of requiring the administration bond to be given to the Judge of the Court of probate (S. 81, Court of Probate Act, 1857) was no doubt to enable that Court to have control over all matters relating to the enforcement of such bonds. It is scarcely necessary to add that it had obviously nothing to do with the English period of limitation as regards the enforcement of such a bond which was 20 years from the breach of the condition. It seems to their Lordships that the words used in S. 292, Succession Act, like those used in S. 83, Court of Probate Act, 1857, are far from assisting the contention that a new cause of action arises upon the assignment. The bond is assigned to a person who is thereupon to be entitled to sue on the bond in his own name "as if the same had been originally given to him" and he is to be "entitled to recover thereon . . . the full amount recoverable in respect of any breach thereof." These sentences do not in the least support the view that a fresh cause of action arises and that therefore the condition of the bond is not broken for the purposes of the Limitation Act until the date of the assignment. The judgments of the appellate Court of Rangoon in 1 Rang 463³ and of Blackwell J., in 60 Bom 1027¹ are in the opinion of their Lordships correct and the decision of the appellate Court in the latter case must be taken to be erroneous.

This view makes it unnecessary to consider any of the other questions raised on the appeal and cross-appeal. The defence of limitation under Art. 68 was a good one and the suit should have been dismissed with costs.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the cross-appeal should be dismissed and that the respondent to the appeal should pay the costs here and below.

D.S./R.K. *Appeal allowed.*
Solicitors for Appellant — Smiles & Co.
Solicitors for Respondent — T. L. Willson & Co.

A. I. R. 1941 Privy Council 11

(From Rangoon)

29th October 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

Ismail Ahmed Peepadi — Appellant
v.

Momin Bibi and others — Respondents.

Privy Council Appeal No. 7 of 1940.

(a) *Evidence — Adverse inference — Plaintiff claiming to be A's legitimate son — Defendant pleading divorce of plaintiff's mother by A before his birth — Neither party producing talaknama — No adverse inference can be drawn against either party.*

Where the plaintiff claims to be the legitimate son of A and the defendant pleads the divorce of the plaintiff's mother before his birth by a talaknama which is not produced by either side, no adverse inference can be drawn against either party on that account. [P 12 C 1]

(b) *Evidence Act (1872), Ss. 4, 112 — Discretion under S. 4 should be exercised in judicial manner according to circumstances of case — Marriage proved to have been performed on certain date — Court can either regard it as subsisting at subsequent date unless it is disproved or call for proof of it.*

Under S. 4 it is open to the Court upon proof of the marriage having been performed on a certain date either to regard as proved the subsistence of the marriage on a subsequent date unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by the first clause of S. 4 in a judicial manner according to the circumstances of the case. [P 12 C 2]

(c) *Evidence Act (1872), S. 112 — Continuance of marriage need not be shown in any special manner.*

The continuance of a marriage for the purposes of S. 112 does not require to be shown in any special manner. [P 12 C 2]

(d) *Mahomedan law — Legitimacy — Acknowledgment — Wife poor and of lower social standing — Husband keeping marriage secret to some extent and not taking wife to live at his father's house — Child's claim as only child does not necessarily fail because father is not shown to have treated him as he should ordinarily have been treated — Important question in such circumstances to consider is whether father maintained and supported child.*

Where the husband marries a poor wife of lower social standing and keeps his marriage with her to some extent secret and never takes her to live at his father's house, the child's claim as the only

child of the marriage does not necessarily fail because the father is not shown to have treated him as one would ordinarily expect an only child to have been treated by his father. By far the most important question in such circumstances is whether the father maintained and supported the child. [P 13 C 1]

(e) *Evidence — Chance witness — Evidence of, though not necessarily false it is rash to rely on it.*

Though the "chance witness" is not necessarily a false witness, it is proverbially rash to rely upon such evidence. [P 13 C 2]

C. S. Rawcastle and Kenelm Preedy

— for Appellant.

Wilfred Barton and W. Wallach

— for Respondents.

Sir George Rankin. — The appellant Ismail Ahmed Peepadi (herein called "the plaintiff") was born on 1st May 1919. On 12th November 1936 — when he was seventeen years old — the suit out of which this appeal arises was brought on his behalf in the District Court of Amherst in Burma. Abdul Gaffoor, his mother's elder brother, acted as next friend, and on 8th December 1936, leave was obtained to sue in forma pauperis. The purpose of the suit was to establish that the plaintiff was the legitimate son and only child of one Haji Ahmed Peepadi, an inhabitant of Moulmein, who had died there on 8th August 1935, leaving one widow Momin Bibi, defendant 1 and that under the law applicable to Sunni Mahomedans the plaintiff was entitled to a fourteen annas share in the deceased's estate. This claim had been first made, so far as appears, by a lawyer's letter dated 18th February 1936. The estate of the deceased consisted in part of a one-fourth share in the estate of his father who had died on or about 12th January 1935. The defendants to the suit, in addition to the widow, were the deceased's brother Cassim, his step-brother Hashim, and two step-sisters. They all joined in one written statement dated 21st December 1936.

The case made by the plaintiff was that Ahmad Peepadi, the deceased, had married the plaintiff's mother Mariam Bibi on or about 20th October 1916, and that though he had in the end dissolved this marriage by giving her talak this divorce had not taken place until after the appellant's birth. Save that the date of the divorce was alleged to be "sometime after the birth of the plaintiff" no date was assigned to it by the plaintiff, but the evidence called for the appellant is to the effect that he was over a year old at the time. It is proved and admitted that on 8th July 1921, at Rangoon Mariam Bibi married again, her second husband being called Ismail. The date of her death is not stated in any of the pleadings, but is put by

a witness Maung Ba (D. W. 11) and by the learned District Judge as about 1925. The case made by the pleading and witnesses of the defendants is that though Ahmed Peepadi's marriage to Mariam Bibi had taken place on 20th October 1916, as alleged by the plaintiff, it was dissolved on 10th November 1916 — within a month — by a talaknama being served upon her on her husband's behalf.

The single issue framed by the trial Court was: Is the plaintiff the lawful issue of Haji Ahmed Peepadi? Over a score of witnesses were called on each side. After the learned District Judge Mr. A. T. Rajan, who began the trial, had in March 1937, heard twenty-two of the witnesses for the plaintiff he was succeeded by another learned Judge Mr. Ba Hla Thein, who from June to September 1937, heard two more witnesses for the plaintiff, the plaintiff's own evidence and the oral evidence for the defendants. Judgment was given by Mr. Ba Hla Thein on 27th October 1937, in favour of the plaintiff, finding him to be the lawful son of Ahmed Peepadi deceased, and a preliminary decree for administration of the deceased's estate upon that footing was drawn up. This, by some error which is unexplained, directed the defendants to pay to the plaintiff two lakhs of rupees, but its terms need not now be scrutinized. On appeal by the defendants to the High Court at Rangoon, the decision of the trial Court was reversed by Goodman Roberts C. J., and Dunkley J., who held that the plaintiff had failed to prove that he was the lawful son of Ahmed Peepadi. From their decree of 6th April 1938, dismissing the suit the plaintiff has appealed to His Majesty in Council.

The matter which requires to be determined is the date of the divorce whereby the marriage of Ahmed Peepadi to Mariam Bibi was dissolved. Though the talaknama was presumably dated it has not been produced by either side and their Lordships are unable to draw an adverse inference against either party on that account. The marriage of 20th October 1916 is not disputed nor is it disputed that Mariam Bibi gave birth to the plaintiff on 1st May 1919. If the divorce took place after the plaintiff's birth, S. 112, Evidence Act, would conclude the present case in his favour since no case is made of the husband and wife having had no access to each other. A question has been raised whether S. 112 applies only to cases in which the continuance of the marriage is established positively or directly, or whe-

ther it can be brought into effect by proof of the marriage and by the consequent presumption that the relationship continued. There is in India at least one authority in favour of the latter view, 7 Bom L R 95.¹ But as their Lordships have not found it necessary to call upon counsel for the respondents and as the decision of the appeal does not in their view depend upon any question as to the burden of proof, they do not propose to discuss any general questions of this character. The presumption of continuance is dealt with by the Evidence Act in S. 114 (cf. illus. (d) thereto). Under S. 4 it was open to the Court in India upon proof of the marriage of 20th October 1916, either to regard as proved the subsistence of the marriage in May 1919, unless and until it should be disproved, or else to call for proof of it, using the discretion entrusted to the Court by cl. 1 of S. 4 of the Act in a judicial manner according to the circumstances of the case. The right of the appellant cannot under the Act, be put higher, and their Lordships will not assume that the continuance of the marriage requires for the purposes of S. 112 to be shown in any special manner.

Ahmed Peepadi belonged to one of several moslem families who had migrated to Burma from Surat in Western India, and had settled in Moulmein, where they were known as Soorties (Suratees). His age at the time of his death in 1935 is said by his first cousin (D. W. 15) to have been 60 or 65 years, so that in 1916 he would be some 40 years old. Mariam Bibi is said by one witness to have been at that time 20 or 22 years old, but neither her mother nor her sister mention her age in their evidence. It appears from evidence which is hazy that Ahmed Peepadi was married four times in all — his wives being taken in succession. The first was Khatiza (a relation of the witness Jeewa) who died, it would seem, about 1912. Mariam Bibi would seem to have been the second. It is said by the defendant Cassim in his evidence that Ahmed Peepadi married Ainsha Bibi, daughter of Hashim Bawa Jan, in 1922, and married defendant 1 Momin Bibi a year and half before his death—that is about 1933. Ahmed Peepadi seems to have lived throughout at his father's house in the neighbourhood of the Big Bazaar of Moulmein. The home of Mariam Bibi, her mother and sisters was not far away — a house numbered 52 Kwingyaung Street in the Maunggan quarter of the town.

1. ('05) 7 Bom L R 95, *Bhima v. Dhulappa*.

Mariam Bibi, according to the evidence for the plaintiff, lived with her mother in Moulmein for a year or so after her divorce; then remarried and went to live in Rangoon, the plaintiff being kept with her mother at Moulmein on the request of Ahmed Peepadi who said he had no one to look after the child. It is also said by the plaintiff and Ma Halima that they lived with the defendant Cassim for a time, this arrangement being given up only because the plaintiff quarrelled with Cassim's sons, but Cassim and Golam Hussein Bangee (D. W. 19), his neighbour, deny that the plaintiff ever lived with Cassim.

The years between 1921 and 1935 would seem to afford sufficient time for conduct on the part of Ahmed Peepadi showing whether he did or did not regard the plaintiff as his son. It is true that Mariam Bibi being poor and of lower social standing, his marriage with her seems to have been kept to some extent secret and he never seems to have taken her to live at his father's house. Hence the plaintiff's case does not necessarily fail because Ahmed Peepadi is not shown to have treated the plaintiff as one would ordinarily expect an only child to have been treated by his father. Though it is by no means the case made by the plaintiff or his chief witnesses, the learned District Judge thought that the effect of the evidence was that Ahmed Peepadi did not openly acknowledge the plaintiff as his son but treated him as one until his death, while all the other members of the family treated him as an impostor or outcaste. Now by far the most important question in such circumstances is whether Ahmed Peepadi maintained and supported the plaintiff during all these years. The plaintiff and Ma Halima give evidence of a very sketchy character of payments made in a casual and uncertain manner, and though the matter is not given by the learned District Judge the importance which it deserves, his view is that the evidence of the plaintiff and his grandmother on this point is uncorroborated and must be left out of account altogether. The learned Judge rejects in like manner certain witnesses called to show that Ahmed Peepadi used to take the plaintiff and Mariam Bibi to Thaton. On these points the correctness of the findings of the learned Judge can hardly be disputed and the absence of all reliable detailed evidence that Ahmed Peepadi was supporting the plaintiff is a great difficulty in the plaintiff's way.

Evidence was given that Ahmed Peepadi

after the plaintiff's birth continued to visit Mariam Bibi at 52 Kwingyaung Street in the Maunggan quarter of Moulmein, that he took some notice of the plaintiff both in 1920 and in later years, that he attended the head-shaving and circumcision ceremonies of the plaintiff. The evidence about Ahmed Peepadi's visits to Mariam Bibi in 1920 is of great importance if it can be relied on; but on the other points the evidence comes to little and is of doubtful credibility in any view. One Eusoof Ebrahim Mayet (P. W. 5) spoke to Ahmed Peepadi's visits to Mariam Bibi in 1920 giving as his reason for fixing the date that he was working at the time on the wreck of the vessel "War Puffin," which was sunk near the Amherst lighthouse. This evidence was countered by that of a witness called Karimuddin (D. W. 6) who deposed that work on the ship was abandoned in May 1920, and that Mayet could not have been at work on it until 1923. The learned District Judge who had not seen the witness Mayet accepted his evidence, but their Lordships think that it would be most unsafe to rely upon it. So too with the evidence of a Chinese merchant named Ah Choy (P. W. 21) who stated that ten or twelve years before (1925-27) he travelled to Rangoon with Ahmed Peepadi and Ahmed Sulaiman Jeewa; that Ma Halima and the plaintiff (then eight or nine years old) had a meal on the train in their company; that Ahmed Peepadi on that occasion told the witness that the boy was his son, and that he could now identify the plaintiff as the boy since the railway compartment was lighted.

The occasion of the witness's visit to Rangoon seems to have made but small impression upon so excellent a memory; that it was a Viceroy's visit, and that the Viceroy was Lord Curzon were tentatively suggested, but in the end he could only say that it was some feast. By stating that he went with Ahmed Peepadi and Jeewa by special arrangement this witness does not remove himself from the very well known category of "chance witness," whose evidence so commonly discloses a meeting with the very person whose admission is required and details how the admission was volunteered in the course of conversation. Though the "chance witness" is not necessarily a false witness, it is proverbially rash to rely upon such evidence. In the present case the evidence of the plaintiff himself as to staying at the Moulmein Club at Rangoon when Ah Choy was also there fits in

ill with Ah Choy's statement, and the witness Jeewa further contradicts it.

Again, a conveyance of the house 52, Kwingyaung Street, dated 29th January 1917, is produced whereby the property is transferred by Ahmed Peepadi for Rs. 600 to Mariam and her two sisters without any mention being made either that Mariam was the wife of the transferor or of any other consideration than Rs. 600. The witness Jeewa says that the property was conveyed after and because of the divorce of November 1916, and only after some persuasion on his part. Ma Halima says that it was conveyed after the marriage and that Jeewa had promised it at the time the marriage was being arranged. It seems that the house had formerly belonged to Mariam's father and that Ahmed Peepadi had obtained it by paying off certain charges. The learned District Judge thought that this conveyance proved that no divorce had taken place by January 1917, because it contained no recital to that effect, but in their Lordships' opinion it is at least as cogent to say that had Mariam been the wife of the transferor she would have been so described. The plain fact is that the document of itself does not decide between the rival stories of its origin. On these three matters, the evidence of Mayet, the evidence of Ah Choy and the effect of the conveyance of 29th January 1917, their Lordships prefer the view taken in the High Court to that of the learned trial Judge. They see nothing in any of these matters which can be regarded as decisive in the plaintiff's favour.

It remains however that a number of witnesses have spoken to the divorce having taken place when the plaintiff was a year or more old. These need not all be mentioned, but Mariam's mother, brother, sister and brother-in-law say so, and in their case the sole question is as to their truthfulness since they would certainly know the facts. Of other witnesses to this effect Mahomed Esa (P. W. 17) who lives in the same street as Ma Halima dates the divorce as in August 1920, and his brother Mahomed Moosa (P. W. 18) says that the divorce was a year after the plaintiff's birth. Similar evidence is given by Ahmed Sultan (P. W. 22) but this witness is confused as to dates. This evidence regarded as a whole suffers heavily from the failure—almost, if not quite, complete—to give a specific account of the date and circumstances of the divorce. Its vagueness makes it unimpressive. However, though this and the failure of the plaintiff to afford

any reliable proof of Ahmed Peepadi having provided his maintenance are matters which tell against the plaintiff's case, it is necessary to take account of the fact that the defendants' case that Mariam was divorced within a month of marriage is one to which some improbability attaches.

As against the story which would put the divorce towards the end of 1920, the evidence of the defendants' witnesses must be carefully scrutinized. The main witness on this point, Ahmed Sulaiman Jeewa, gave evidence on commission in January 1937, before the trial, and died according to the defendant Cassim on 3rd April of that year. That he was a great friend of Ahmed Peepadi is not in doubt in view of Ma Halima's statements. His evidence is that 15 or 20 days after the marriage Ahmed Peepadi came to him at his shop and complained of Mariam's conduct and said he wanted to divorce her: that two days afterwards Saya Galay (described as "priest" of the mosque) at the witness's shop wrote down at Ahmed Peepadi's dictation a talaknama which was signed by the latter. This document was given to two persons Ebrahim Hashim Poo and one Madani, now dead, who went by the name of Lulu. They were asked to go with Mamoo Ko Yacoob and serve it upon Mariam. They returned and said they had done so. Ma Halima, who gave her evidence in March 1937, said that Ko Yacoob and Lulu brought the talaknama, that they are both dead, that Ebrahim Poo did not come with them, and that the talaknama was taken to Rangoon by Mariam to show to her second husband. Ma Sisha (P. W. 11), though called for the plaintiff, stated that she was present when the talaknama was delivered by Yacoob and two men from the Big Bazaar, that this was before the plaintiff's birth, that Lulu was one of the two men, but she did not know if Ebrahim Poo was the other. The defendant Cassim says that as Ahmed Peepadi had no children he adopted the daughter of Lulu, who was given jewellery and money by him and by his parents. Ebrahim Hashim Poo (D. W. 8) corroborates Jeewa and states that he went with Lulu Madani and Yacoob to Mariam's house and gave her the talaknama and that Lulu read out its contents. He is cross-examined to suggest that he is not a person who would have been entrusted with the duty of serving a talaknama.

Moti Rahman (D. W. 12) deposed that Lulu alias Madani was his aunt's husband, that he lived in Abrew Street and died at the

age of 43 about 18 years before. To this is added proof of the death register for 1919 in which is an entry of the death of one Lulu aged 43 years, a Mahomedan trader of 4, Abrew Street, on 8th December 1919, and the signature of Moti Rahman as the person reporting the death. Moti Rahman was not cross-examined at all by counsel for the plaintiff, though the point of his evidence is manifest, viz., that if Lulu died in December 1919, he could not have taken part in serving the talaknama on Mariam Bibi when the plaintiff was a year or a year and a half old, as the trial Judge puts it, towards the end of 1920, or as the plaintiff's witness Mahomed Esa (P. W. 17) puts it, in August 1920. The course adopted towards this evidence by the plaintiff and assented to by the trial Judge is to suggest that the Lulu who died in 1919 was a different person from the Lulu who according to the evidence on both sides took part in serving the talaknama. This in their Lordships' opinion, as in that of the High Court, is unreasonable. That the Lulu who served the talaknama was called Madani, was spoken to by Jeewa before the trial began as also by Ebrahim Poo and Moti Rahman, who are not cross-examined to suggest the contrary. The person in question was known to Ma Halima and his identification could have been challenged in detail, particularly if he was the father of Amina Bibi who was said by Cassim to be living in the Peepadi's house as having been adopted by Ahmed Peepadi. To wait until the time of argument to suggest that there were two Madanis called Lulu, without making any attempt to enquire of the witnesses, is not a reasonable way to conduct such a case as the present. On this point their Lordships find themselves in agreement with the High Court in thinking that it must be taken that the entry in the death register relates to the Lulu who took part in effecting Mariam's divorce. The case made by the plaintiff as regards the date of divorce is thus displaced: it cannot have taken place when the plaintiff was a year old or at any time after 1919.

There is a still more serious challenge to the plaintiff's case in the evidence given by Maung Ba and Mrs. Buchanan at the trial, and by U Chit Swe taken on commission in September 1937. Maung Ba says that from 1918-23 he was clerk to a pleader called Buchanan who practised at Moulmein, and who in 1923 went to practice at Insein; that in 1920 Mariam Bibi came to Mr. Buchanan with her child and her mother to get him

to take steps to obtain maintenance for the child against a barrister U Chit Swe. He says that at first Mr. Buchanan did not like to file a case against a brother lawyer but in the end she came with the witness Korban Ali (D. W. 18) and insisted, so that Mr. Buchanan was persuaded to send a notice to U Chit Swe. That notice or letter was typed and served on U Chit Swe by Maung Ba himself according to his evidence, and a carbon copy of it kept by Buchanan in the ordinary course of office practice has been produced by his widow (D. W. 1) from among the papers left by him. This is Ex. 8. It is dated 29th April 1921. It mentions that the client is Ma Yan of Maunggan Quarter, Moulmein, and it demands thirty rupees for maintenance for herself and her child. There are also two entries in Buchanan's fee book showing receipt of Rs. 10 and Rs. 5 on 29th April and 11th May of that year from Ma Yan in respect of "criminal case 20." Ma Yan is the Burman form of Mariam, and Maung Ba lived near to Kwingyaung Street in Moulmein and knew the plaintiff's mother, though Mrs. Buchanan did not. His evidence is corroborated by Mrs. Buchanan and by Korban Ali, who is a native of Moulmein and claims to have known Ma Halima from his childhood. It seems unnecessary to dwell on their evidence in view of the position of U Chit Swe, who admitted to having been intimate with Mariam Bibi for about a year and a half in 1917-18. He says she claimed to be the divorced wife of Ahmed Peepadi. He says she had no child then. He admits receiving a notice in terms of Ex. 8 from Mr. Buchanan. In cross-examination he stated that he had a child by a girl whom he kept for nine months in 1916, and that his brother made a lump sum payment to her: that he did not reply in writing to Mr. Buchanan's letter but spoke to him denying the claim. The learned trial Judge arrived at the conclusion that

it is more likely than not that the Ma Yan referred to in the exhibit notice was the other woman with whom U Chit Swe got a child and of whose name he says he has no recollection.

Their Lordships bear fully in mind that Mrs. Buchanan said that there was a settlement in Ma Yan's matter before she left for Insein, and also that she said that the child she saw might have been under a year; but they think that the conclusion of the learned Judge is without foundation. It is necessary to alter the dates and facts given by U Chit Swe to fit in with it. That there should be two women of the same name belonging to

the same quarter of Moulmein, and with a child about a year old, and that the defendants should be able to get the person alleged to have had relations with the one to pretend to have had relations with the other is very far from probable. The witnesses Maung Ba and Korban Ali may be open to suspicion of partiality and perhaps of something more, but when their evidence is taken in connexion with the admitted documents and the evidence of U Chit Swe it cannot be rejected upon a gratuitous supposition as to there having been in 1920 and 1921 another woman of the same name claiming against U Chit Swe. It is true however that before arriving at a final conclusion on this point account should be taken of the evidence as to the name under which the plaintiff passed as a schoolboy.

In 1927 and 1928 he was entered in the books of his schools as Ismail, son of Peepadi, and from 1931 to 1935 he was at the Government High School, Moulmein, under the name of Ismail Peepadi, son of Ahmed Peepadi. In June 1935, he was admitted as a free scholar to a Muslim school at Kandawglay in Rangoon on the request of a Mr. C. E. Dooply (P. W. 3) and was taken there by Ma Halima. Both Dooply and the superintendent of the school have given evidence: the former says that he asked the school to take the boy free as he was poor: the latter says that the reason explicitly given was that the boy was an orphan, and that Abdul Gaffoor was dealt with as the boy's guardian. Notwithstanding that Ma Halima says that Ahmed Peepadi sent her and the boy to Dooply, the evidence of Dooply and of the superintendent does not show that Ahmed Peepadi had anything to do with the plaintiff being sent to this school, and it seems certain that he paid nothing on his account. Their Lordships cannot think it improbable that the boy should have been given the name of the mother's husband even if he were born more than two years after divorce; nor do they think it at all likely that the husband would make it his business to object, if he got to know of the name under which the boy was sent to school. Reviewing the evidence as a whole their Lordships agree with Dunkley J. in holding it proved that in 1920-1921 Mariam Bibi was alleging that U Chit Swe was the father of the plaintiff.

It is not necessary that any opinion should be expressed as to the reliability of the witness Haju Mahomed Ali, who says that he acted as witness at the second mar-

riage of Mariam in 1921 and that in answer to his question she stated that she had been divorced five or six years before. Nor do their Lordships propose to discuss the value of the entries in the diary (Ex. 4) which are said to be in the handwriting of Ahmed Peepadi, or the question whether the complaint against Mariam Bibi brought in May 1918, in the Court of the Honorary Magistrate at Moulmein was made by Ahmed Peepadi. They think it right, however, to mention the will dated 15th July 1935 which is spoken to by A. L. Roy (D. W. 14), Ahmed Mahomed Peepadi (D. W. 15) and A. S. Jeewa. This declares Cassim and Momin Bibi to be the legal heirs of Ahmed Peepadi the testator, and that he has no other legal heir. Their Lordships agree with the High Court in thinking that no sufficient reason can be shown for treating this document as a forgery, especially in view of the fact that it was presented to the Court of a Magistrate on 24th September 1935 within a few weeks of the death.

In the result their Lordships think that the High Court have taken the right view of the evidence. They do not think that it is shown that the marriage of Mariam with Ahmed Peepadi was a subsisting marriage in 1919, but consider on the contrary that the case of the defendants as to the date of the divorce must be accepted as true. They will humbly advise His Majesty that the appeal should be dismissed. The appellant must pay the costs.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellant — *Holmes Son & Pott.*
Solicitors for Respondents — *Gard Lyell & Co.*

* * A. I. R. 1941 Privy Council 16

(From Calcutta)

11th November 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

*Maharaja Sris Chandra Nandy and
another — Defendants — Appellants.*

v.

*Rakhalananda Thakur and others —
Plaintiffs — Respondents.*

Privy Council Appeal No. 13 of 1939;
Bengal Appeal No. 1 of 1938.

(a) Evidence — Suit by priests for declaration that certain estate was charged with payment of their britti — Plaintiffs though having complete record of their transactions not producing any document evidencing charge—This is sufficient to cast doubt on their claim.

Where certain priests bring a suit for declaration that certain estate was charged with payment of their annual britti and, although in possession of very complete records of their transactions from very early times, produce no document evidencing the charge this fact alone is sufficient to cast doubt on their claim. [P 19 C 1]

(b) *Charge* — *Valid charge can be created on whole of man's property — But charge for small sum on vast estate as a whole is improbable.*

It is true that a valid charge can be created upon what could be defined to be the whole of a man's property at the date of the charge but it is improbable that a vast estate should be charged as a whole with payment of a small sum a year.

[P 19 C 2]

(c) *Grant* — *Continuous payments alleged to be granted or charged not explainable without asserting some legal origin—Court would presume necessary legal origin.*

If the continuous payments alleged to be granted or charged could not be explained without asserting some legal origin which could create the rights claimed, any Court would feel inclined to presume the necessary legal origin.

[P 19 C 2]

(d) *Practice* — *Inference from evidence — If it is not safe from evidence for appellate Court to draw particular inference it is also not safe for trial Court to draw inference.*

If it is not safe from the evidence for the appellate Court to draw a particular inference it is also not safe for the trial Judge to draw the inference. Not safe must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

[P 20 C 1]

(e) *Evidence Act (1872), S. 32 — Evidence of tradition in family is hearsay evidence and is not admissible under s. 32.*

The evidence of witnesses speaking of a tradition in their family is hearsay evidence, and is not one of the claims of hearsay evidence admissible under the provisions of S. 32.

[P 20 C 1]

(f) *Evidence Act (1872), S. 2 (1)—Evidence excluded by statute as inadmissible should not be admitted merely because it may be essential for ascertainment of truth: 41 C W N 1103 = 65 C L J 520, REVERSED.*

What matters should be given in evidence as essential for the ascertainment of truth, it is the purpose of the law of evidence whether at common law or by statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to des-

troy the whole object of the general rule: 41 C W N 1103 = 65 C L J 520, REVERSED. [P 20 C 1, 2]

J. Millard Tucker and W. Wallach —

for Appellants.

Sir Thomas Strangman and C. Bagram —

for Respondents.

Lord Atkin.—This is an appeal from the High Court of Judicature at Fort William in Bengal who affirmed a decree of the Additional District Judge, 24 Parganas, in favour of the plaintiffs, the present respondents. The plaintiffs are a distinguished family of Brahmin priests, Thakurs of Sri-khanda: and their claim is for a declaration that they are entitled to a charge on the Kasimbazar Raj Estate represented by the defendants for an annual britti of Rs. 4000 payable by half-yearly instalments and for a money decree for arrears amounting to Rs. 13,260. The defences to the suit are in substance that the plaintiffs never had a legal right to the britti, and that in any event it was not charged upon the estate. These issues were raised in the proceedings and have been decided in favour of the plaintiffs in both Courts. The history of the claim begins with the founder of the Raj fortunes, one Krishna Kanta Nandy. He appears to have been a Hindu of comparatively humble origin who by his abilities attracted the attention of Warren Hastings, became his Diwan, and died in the year 1778, proprietor of large possessions in about twelve different districts and in Calcutta. After his death, his son Loknath appears to have been given the title of Maharajah of Kasimbazar by Warren Hastings, and the property to which he and his descendants have succeeded is known as the Kasimbazar Raj Estate. The case of the plaintiffs is that Krishna Kanta Nandy established two deities Radhagovinda and Lakshminarayan at Shrikhanda, the plaintiffs' home, and granted the plaintiffs a britti of Rs. 4000 for the worship of the two deities: and at the same time charged his Raj estate with the payment of the britti. The plaintiffs and their successors, it is said, became the gurus of Krishna Kanta Nandy and his family and its successors: they have conducted the worship and service of the deities ever since.

The learned Assistant District Judge found that the plaintiffs had established the whole of their case. A permanent grant of britti was made by Krishna Kanta Nandy who had established at the home of the plaintiffs the two deities and provided the britti for securing their service and worship. To secure the permanent payment he had charged it upon the estate. The learned

High Court Judges were not able to find that Krishna Kanta Nandy had established the deities, but they concurred in the finding that he had made a permanent grant, and had charged it upon the Kasimbazar estate. Their Lordships are of opinion that no evidence was given sufficient to support these findings. As they will point out later, both Courts erred in admitting as valid evidence of tradition given by and on behalf of the plaintiffs: and when the admissible evidence is considered there is none to justify the finding of a permanent grant or of a charge. The evidence establishes the following facts: that from the time of Krishna Kanta Nandy the sum of Rs. 4000 has been paid annually to the plaintiffs and their successors as britti: that they have continuously conducted the worship and service of the two deities: and that until about the year 1897 such worship was conducted on behalf of the holder of the Raj and that the plaintiffs were the gurus of his family. The succession of the Raj family is relevant. Krishna died in 1778 and was succeeded by his son Loknath who first received the title of Maharajah. There is nothing to indicate that this is an impartible estate. Indeed, what little evidence there is on the point indicates the contrary, but in fact there only appears to have been one person at a time entitled in the line of descent. Loknath was succeeded by Harinath who died in 1832, who was succeeded in turn by his son Krishnanath, who died in 1844 without issue. His widow Rani Swarnamayi succeeded to the estate and possessed it for over 50 years until her death in 1897.

On her death the estate reverted to Krishnanath's mother Rani Hari Sundari. She, who must have been a very old lady at the time, in the same year, transferred her interest to the next successor Manindra Chandra Nandy, the son of her daughter Gobinda. The estate thus passed out of the direct male succession. Manindra had for his gurus another family the Thakurs of Jogeswardi, and had family deities other than Radhagovinda and Lakshminarayan. In 1923 Manindra Chandra Nandi executed a trust deed in favour of the firm of Ogilvy Gillanders & Co., and certain named trustees with the object that the firm should raise a loan for the Maharajah of £675,000 and pay off certain scheduled incumbrances and unsecured liabilities. The bulk of the Raj estate was assigned to the trustees by way of mortgage or trust to keep down the necessary charges, and create certain reserve

funds including a sum of three lacs which the Maharajah estimated would be sufficient for his personal household expenses. The Maharajah covenanted inter alia that the property was free from all incumbrances other than those mentioned in Sch. 4 to the deed which did not include the charge now alleged to exist. In February 1929 on the application of the Maharajah Manindra the estate was taken under the management of the Court of Wards by whom it is now managed subject to the provisions of the deed of trust of 1923. In 1929 the Maharajah Manindra died and was succeeded by the present Maharajah Sris Chandra Nandy. On 10th April 1929 the plaintiffs presented a petition to the General Manager of the Kasimbazar Raj Ward's Estate alleging that they had been receiving for generations from the estate an annual annuity allowance of Rs. 4000, that they had been spending the said allowance as well as their own income towards the worship of several deities and other acts of piety: and asking for the payment of one year's arrears. It may be noticed that in this letter there is no suggestion of the establishment by Krishna Kanta Nandy of the two specified deities, or of a permanent grant by him, or of the creation of any charge. This request was refused by the Manager of the Court of Wards and on 28th June 1929, the Maharajah Manindra wrote to him having been told by the plaintiffs of the refusal.

Kasimbazar Rajbari,
The 28th June 1929.

My dear Mr. Burrows,

I have read your letter No. 575ES/16-108 dated the 4th May 1929 (a copy of which was forwarded to me) as also another letter No. 1565ES dated the 15th June 1929 (shown to me) sent in reply to the letters of Srijut Rakhalananda Thakur of Shri-khanda.

The annual Britti payable to our spiritual guides, the Thakurs of Shrikhanda amounting to Rs. 4000 (Four thousand) has been paid by the Raj family of Kasimbazar from generation to generation, and I have been paying it all along during my management.

During Mr. Lyall's administration as he did not like to meddle with Religious and Spiritual matters, he left the matter with me of course leaving sufficient fund in my hands.

It is not of the nature of personal charity but has always been regarded as a charge upon the estate. I have nothing to say regarding your decision. You may hold it or alter it if there be good reason for doing so, but this Britti in my opinion, is legally enforceable against the Kasimbazar Raj Estate.

In this connexion I would like to refer you to my letter No. 1/XII-4/3-G dated the 19th April 1929 in which I mentioned the recurring permanent grants which in addition to other commitments I am bound to make viz., 1. To spiritual guides of Shri-

khanda and Jageswardihi, 2. Debkarjya and Deb-sheba &c. and to my letter to the Secretary, Board of Revenue dated the 2nd February 1929 with statements therewith attached, a careful perusal of which will clearly convince you that the above demand is a charge really upon Kasimbazar Raj Estate and incidentally upon me as proprietor of the Estate and not in my personal capacity.

The following is an extract of the relevant portion of my letter to Mr. Fawcus, Secretary, Board of Revenue dated the 2nd February 1929 for your easy reference.

"I should like to state however in this connexion that whereas I have these additional sources of income which are not covered by the trust deed I have at the same time additional demands on me for Debkarjya, Brittis for spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past."

I shall be glad if you will consider all the facts relating to this matter and recommend to the Court for acceptance of the charge of paying Rs. 4000 annually to the Thakurs of Shrikhanda which is in reality a charge on the Kasimbazar Raj Estate.

Yours sincerely,

Manindra Chandra Nandy.

L. B. Burrows, Esqr., B. A.,
Manager, Kasimbazar Raj Wards' Estate,
2/1, Russell Street, Calcutta.

So far from regarding this letter as proof of a legal charge, their Lordships are of opinion that it tends to negative such a claim. The Maharajah is obviously seeking to limit his personal liabilities: and is treating the continual payment of this britti as an instance of the

additional demands on me for Debkarjya and britti for spiritual guides and Brahmin Pundits and the maintenance of educational institutions which have been recognised by the family from generations past.

It seems obvious that the continuous recognition is to him another way of saying it has always been regarded as a charge upon the estate. It would not be suggested that the other "additional demands" in which this claim is included involved legal charges upon the property. It seems obvious the letter of the Maharajah, written in the circumstances set out in the letter, could not possibly outweigh the express covenant in the deed of 1923 that there were no incumbrances other than those scheduled. In the result therefore there is no evidence at all of the establishment of the deities by Krishna, of any permanent grant by him of the britti, or of the creation of any charge upon any property. It is very significant that though the plaintiffs appear to have very complete records of their transactions from early times no document is produced making or evidencing the grant or charge: and this alone is sufficient to cast doubt upon the claim.

Moreover, while it would not be unusual to assign particular lands as the source from which britti was to be paid and in this sense create a charge, it would seem to their Lordships very improbable that a vast estate should be charged as a whole with the payment of Rs. 4000 a year. Their Lordships are not prepared to say that a valid charge could not be created upon what could be defined to be the whole of a man's property at the date of the charge. In the present case it should be noticed that not only is the charge claimed and decreed a charge upon the estate as it at present exists; but it has been decreed without any condition that the families of the grantor or the plaintiffs should continue to exist, or that the plaintiffs should continue to perform the service and worship, sheva and puja, of the two named deities. This defect in the decree was admitted by counsel for the respondents who submitted an amended form of decree which would remedy the mistake. But for present purposes the point is the difficulty the plaintiffs are in, in establishing any grant or charge with any sufficient certainty. Naturally, if the continuous payments could not be explained without asserting some legal origin which would create the rights claimed, any Court would feel inclined to presume the necessary legal origin.

But, in the present case, there are no facts which require a presumption of any lost grant either for the permanent gift of the britti or still less for it being constituted a charge. It appears to their Lordships the natural inference from the known facts that the original founder of the estate granted the britti in his lifetime: and that his successors from pious motives continued the grant to the plaintiffs' successors who continued to be the family spiritual guides, and served and worshipped the family gods. Without assuming any legal obligation it would in the circumstances have been strange if the britti had not been continued. The learned trial Judge working backwards, as it would seem from the fact that the payment was continued for several generations, has imputed to the founder the intention that it should continue for all those generations; and has so drawn the inference that he did in fact grant a permanent britti; and took steps to secure its permanence by creating a charge, the uncertainty of the terms of which their Lordships have already discussed.

The trial Judge, it is true, found that Krishna Kanta Nandy established the deities.

The High Court have found that it would not be safe on the evidence to hold that the plaintiffs had established the case that the two deities were so established. Nevertheless they go on to say that they cannot express the definite opinion that the trial Judge was not right in his inference that the deities were so established. This conclusion appears to involve some confusion of thought. If it was not safe from the evidence for the appellate Court to draw a particular inference it was not safe for the trial Judge to draw the inference. Not safe, must mean that there is not evidence from which the inference can reasonably be drawn. There are cases in which evidence is so well balanced that an inference either way can reasonably be drawn. In such cases the appellate tribunal may select the inference they choose: but they can have no equal choice between an inference that is safe, and one that is unsafe.

But the conclusions of the two Indian Courts are not based solely on the evidence of which the substance has been stated above and which their Lordships have held to be insufficient. Both Courts relied on the evidence of some of the plaintiffs' witnesses speaking of a tradition in their family, that Krishna Kanta Nandy had established the two deities, had granted the britti in perpetuity and had made it a charge upon the estate. Obviously this is hearsay evidence, and it is equally clear that it is not one of the claims of hearsay evidence admissible under the provisions of S. 32, Evidence Act.

The members of the High Court recognized this but they made a statement as to the law of evidence which their Lordships feel bound to state is entirely erroneous. They say:

It is to be noticed in this connexion that S. 2(1), Evidence Act, repeals the whole of the English common law on evidence so far as it was in force in British India before the passing of the Evidence Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorized by the Act itself.

This is of course correct. But they continue:

It must be recognized however, that the principle of exclusion adopted by the Evidence Act should not be applied so as to exclude matters which may be essential for the ascertainment of truth.

It seems to their Lordships essential in the interests of the administration of justice in India that this mode of regarding the law of evidence should emphatically be stated to be unsound. What matters should be given in evidence as essential for the ascertainment of truth it is the purpose of the law of evidence whether at common law or by

statute to define. Once a statute is passed which purports to contain the whole law it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by the statute because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether contained in a statute or not, are the result of long experience choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth. But that which has been eliminated has been considered to be of such doubtful value as on the whole to be more likely to disguise truth than discover it. It is therefore discarded for all purposes and in all circumstances. To allow a Judge to introduce it at his own discretion would be to destroy the whole object of the general rule. There is therefore no such principle as is suggested in the passage now under discussion.

At the same time their Lordships wish to make it clear that apart from any rule of law the evidence in question so far from leading to the ascertainment of truth in fact for the reasons already given leads away from it. It is not remarkable that the learned Judges who gave leave to appeal in this case did not conceal some uncertainty as to the correctness of this part of the judgment. Their Lordships do not think it necessary to discuss at any length inferences drawn by both Courts from the absence of evidence by the defendants of the contents of their own books. They do not think that in the circumstances the comments are well founded. In the result therefore their Lordships are of opinion that this suit fails, and that the appeal should be allowed and the suit dismissed. Their Lordships will humbly advise His Majesty accordingly. They notice however that the late Maharajah Manindra clearly regarded the payment of the britti as being a personal obligation of his, and it would seem to follow in their opinion that the Court of Wards would be justified in making payment of the arrears up to the time of his death to the plaintiffs. This is not however a matter for decree in this suit. The respondents must pay the costs in the Indian Courts and of this appeal.

D.S./R.K.

Appeal allowed.

Solicitors for Appellants—*Solicitor, India Office.*
Solicitors for Respondents — *W. W. Box & Co.*

* * A. I. R. 1941 Privy Council 21

(From Lahore : A I R 1937 Lah 683)

17th August 1940

VISCOUNT MAUGHAM, LORD RUSSEL OF
KILLOWEN, LORD WRIGHT, SIR GEORGE
RANKIN AND MR. M. R. JAYAKAR

Mt. Subhani and others — Appellants

v.

Nawab and others — Respondents.

Privy Council Appeal No. 5 of 1939.

(a) Custom (Punjab)—Ancestral land — Mere mention of name of common ancestor in pedigree is not sufficient.

In the Punjab, the mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof, had devolved upon them by inheritance: A I R 1927 Lah 477 and A I R 1932 Lah 353, Rel. on. [P 23 C 1]

(b) Evidence Act (1872), Ss. 48 and 35 — Answers given in Wilson's Manual on Questions of Customary Law in the Punjab are admissible.

Answers in Wilson's Manual on Questions of Customary Law in the Punjab are clearly admissible under S. 48 being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under S. 35 as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty. [P 24 C 1]

* * (c) Custom (Punjab)—Riwaj-i-am—Entries in — Initial presumption is in favour of their correctness—Presumption is weakened by fact that custom recorded therein is not in consonance with general custom or by the fact that females whose rights are affected had no opportunity to appear before the revenue authorities: I L R (1937) Lah 594=A I R 1937 Lah 451=169 I C 909 (F B), OVERRULED.

Though the entries in the riwaj-i-am are entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded is in accord with the general custom, the quantum of evidence necessary to rebut this presumption would, however, vary with the facts and circumstances of each case; where, for instance, the riwaj-i-am lays down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this is not the case and the custom as recorded in the riwaj-i-am is opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the riwaj-i-am affects adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it: I L R (1937) Lah 594=A I R 1937 Lah 451=169 I C 909 (F B), OVERRULED; A I R 1932 Lah 157, Rel. on; Case law reviewed. [P 25 C 2; P 33 C 1]

(d) Custom (Punjab) — Riwaj-i-am—Judicial decisions though of comparatively recent date may be sufficient to rebut presumption of correctness of entry in riwaj-i-am.

A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the presumption as to the correctness of the entry in the riwaj-i-am as regards custom. In such a case, the value of the decision arises from the fact not that it is relevant under Ss. 13 and 42, Evidence Act, as forming in itself a "transaction by which the custom in question was recognised, etc., etc.," but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the riwaj-i-am would add greatly to the perplexities and difficulties of proving a custom: A I R 1937 Lah 451 (F B), Expl. [P 32 C 1, 2]

* * (e) Custom—Proof of—Antiquity — English rule does not apply to India—Nature of proof of antiquity required explained: I L R (1937) Lah 594=A I R 1937 Lah 451=169 I C 909 (F B), OVERRULED.

The English rule that "a custom, in order that it may be legal and binding must have been used so long that the memory of man runneth not to the contrary" cannot be applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must, in every case, be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of particular district: I L R (1937) Lah 594=A I R 1937 Lah 451=169 I C 909 (F B), OVERRULED; A I R 1917 P O 181, Rel. on. [P 32 C 2]

* (f) Custom (Punjab)—Succession—Tullas of Tahsil and District Shahpur—Non-ancestral property — Married daughters are not excluded by collaterals — Onus of proving special custom to contrary lies on collaterals: 39 P L R 566=A I R 1937 Lah 683=172 I C 158, REVERSED.

Among Tullas of Tahsil and District Shahpur, the married daughters are not excluded by the collaterals in matters of succession to the non-ancestral property; and the onus lies on the collaterals to prove that this general custom in favour of the daughters is varied by a special custom: 39 P L R 566=A I R 1937 Lah 683=172 I C 158, REVERSED. [P 33 C 1, 2]

Sir Hari Singh Gour and S. P. Khambatta
— for Appellants.

Respondents Ex parte.

Mr. M. R. Jayakar. — The question in this appeal is whether under the customary law applicable to the members of the Tulla clan resident at mauza Mahmud Tulla in the tahsil and district of Shahpur in the Punjab, collaterals of the tenth degree of a deceased landowner can take precedence

over his married daughters in succession to his non-ancestral estate. The question arose as follows : One Sahlion, a Mahomedan landowner of the Tulla clan, resident as stated above, died, leaving him surviving a widow and two married daughters (appellants before the Board) and some immovable property. The widow subsequently gave the property to the daughters by a registered deed of gift dated 8th September 1934. The respondents claiming to be his collaterals instituted a suit against the widow (defendant 1) and the daughters (defendants 2 and 3) asserting that Sahlion's property was ancestral as regards the plaintiffs and that the widow had no right to make the gift which should be declared void and ineffectual as against the plaintiff's rights and invalid after the death or remarriage of the widow. The widow and daughters denied the claim on the ground that the property was not ancestral and that the plaintiffs had no locus standi to sue, because daughters succeeded to the non-ancestral property as against collaterals, "especially when the plaintiffs are collaterals of the tenth degree." The subordinate Judge who tried the suit dismissed it holding that the plaintiffs were Sahlion's collaterals of the tenth degree, that the lands in the suit were not ancestral and that according to the general rule of custom prevailing among the Mahomedan tribes of the district of Shahpur which applied to the parties the daughters were not ousted by the plaintiffs with regard to succession to the non-ancestral property of their father. In arriving at his decision, the learned Judge relied on the oral and documentary evidence adduced by the parties and upon certain rulings of the Punjab Courts.

The plaintiffs appealed to the High Court at Lahore and that Court in a judgment remarkable for its brevity, allowed the appeal. The material part of the High Court judgment begins with the statement that it is common ground that under the customary law which governs all the Musalman tribes of the Shahpur district married daughters do not inherit their father's estate in any circumstances.

Their Lordships have a difficulty in understanding this statement, because the question stated by the High Court as the "common ground" was precisely the issue in controversy in the case. The judgment bears in several places, indications that the High Court, instead of examining the disputed question on the facts and the evidence in the case carefully considered in the sub-

ordinate Judge's judgment, proceeded entirely on the authority of the questions and answers contained in a Manual compiled by Mr. (afterwards Sir) James Wilson called a "General Code of the Tribal Customs in the Shahpur District of the Punjab" published in 1896. (It may be convenient to refer hereafter to this publication as Wilson's Manual.) Basing their views on certain questions and answers in Wilson's Manual the learned Judges of the High Court held that there was a presumption against inheritance by the daughters and that this presumption had not been rebutted. They therefore allowed the appeal. The judgment contains no detailed criticism of the oral and documentary evidence of custom adduced by the parties all of which was ignored with the brief observation that in a Full Bench decision of the Punjab High Court, 18 Lah 594 = 39 P L R 349¹ it had been stated that recent judicial decisions are not sufficient to abrogate the custom so clearly laid down in Wilson's Manual of Customary Law.

Their Lordships have consequently derived less assistance than they would have expected from the High Court judgment in elucidating the important question in controversy in this appeal.

Before examining the value to be attached to the statements in Wilson's Manual, and the effect of the Full Bench decision, it will be useful to state what the true legal position of the parties was as it emerged from the pleadings. The basis of the plaintiff's claim was that the property in suit was ancestral so far as their rights were concerned. This was denied by the defendants. The onus was therefore on the plaintiffs to prove that the property was ancestral. The subordinate Judge held that the onus had not been discharged. The learned Judges of the High Court did not consider this question, as the statements in Wilson's Manual on which they relied made no distinction between ancestral and non-ancestral property, and stated generally that married daughters "in no case" inherited their father's estate or "any share in it." Before this Board, the respondents did not appear in support of the High Court judgment. Their Lordships have therefore to decide the question on the evidence which is available in this case, and, on reviewing it, they agree with the finding of the subordinate Judge that the land was not proved to be ancestral. In more than one decision

1. ('37) 24 A I R 1937 Lah 451:169 I C 909 : ILR (1937) 18 Lah 594:39 P L R 349 (F B), Bahadur v. Mt. Nihal Kaur.

of the Lahore High Court (*see, for instance, 8 Lah 584² at pp. 539-90 and 13 Lah 404³ at p. 406*) it has been laid down that to establish the ancestral character of land it is not sufficient to show that the name of the common ancestor from whom the parties are descended was mentioned in the revenue pedigree. It should also be proved that the descendants of that common ancestor held the land in ancestral shares and that the land occupied, at the time of the dispute, by the proprietors thereof had devolved upon them by inheritance. It is now settled law in the Punjab that the mere mention of the name of a person in the pedigree table as the common ancestor is no proof of the fact that every piece of land held by his descendants (howsoever low) was originally held by and descended from him in succession from generation to generation. As is explained by Tek Chand J. in *8 Lah 584² at p. 539*,

a genealogical tree of this kind is prepared merely to indicate the relationship of the proprietors in a particular village and is in no sense intended to be a record of the acquisition of every bit of land held by all persons whose names appear in it. It is no doubt presumptive proof of their kinship, but not of the nature of the property owned by them. For that purpose one has to look to the history of the acquisition of the village.

The extracts from the settlement records relating to the land in dispute, which are a part of the evidence in this case, justify the finding of the subordinate Judge. Before examining the questions and answers in Wilson's Manual, it will be useful to ascertain the customary rights of daughters against collaterals with reference to ancestral and non-ancestral land as they are stated in Sir W. H. Rattigan's Digest (of Civil Law for the Punjab, chiefly based on Customary law, 1935 edition), a book of unquestioned authority in the Punjab. In para. 23, (p. 79) it is stated that (1) a daughter only succeeds to the ancestral landed property of her father, if an agriculturist, in default (a) of heirs mentioned in the preceding paragraph (*viz.*, male lineal descendants, a widow or mother), or (b) of near male collaterals, provided that a married daughter sometimes excludes near male relatives, especially amongst Mahomedan tribes, under circumstances specified in the paragraph (not material to the present issue); (2) but in regard to the acquired property of her father

the daughter is preferred to collaterals. It is further stated (p. 92)

that the general custom of the province (the Punjab) is that a daughter excludes collaterals in succession to self-acquired property of her father,

and

the initial onus therefore is on the collaterals to show that the general custom in favour of the daughter's succession to the self-acquired property of her father has been varied by a special custom excluding the daughters.

This being the legal position of the parties, the question arises whether, the property being non-ancestral, the plaintiffs have discharged the onus by proving the existence of a special custom excluding daughters. They endeavoured to do this in two ways, (1) by relying on the authority of Wilson's Manual, and (2) by producing oral evidence at the trial.

As the questions and answers in Wilson's Manual formed the main basis of the High Court judgment, it is necessary to examine in detail their value and effect. In the preface of that book, it is stated that the compilation combines the results of several separate enquiries made of village headmen and other leading men of the important tribes in the district, summoned together at different times in November 1893, and January 1894, when certain questions of tribal custom were put to them and their answers recorded in the vernacular. The answers were read out to the assembled representatives of the tribe in the presence of the author, and admitted by them to be correct. Notes were taken in English by the author, but vernacular codes were also drawn up in five parts. These codes contained numerous instances of the custom and the author suggests a precaution that the vernacular codes should be consulted when any question regarding custom arises, as they were accepted as a statement of "the opinions of persons having special means of knowledge" of the usages of the tribe. A table is added, enumerating the tribes consulted and containing details relating to the consultations. One general heading (No. 5) is "Miscellaneous Musalman Tribes," and the tribes included in this category are also specified. The author concludes that the code thus drawn up represents the tribal custom of the whole of the landowning and the trading classes in the Shahpur district.

It is to be noted that the Tulla clan, the material tribe in this case, is not mentioned amongst the tribes consulted separately and must therefore be included among the "Miscellaneous Musalman Tribes." The material portions of questions 16 to 16 (in

2. ('27) 14 AIR 1927 Lah 477 : 102 IC 313 : 8 Lah 584 : 29 P L R 199, Chanda Singh v. Mt. Banto.
3. ('32) 19 AIR 1932 Lah 853 : 138 IC 280 : 18 Lah 404 : 88 P L R 117, Rahmat Ali Khan v. Mt. Sadiq-ul-Nisa.

Wilson's Manual) on which the High Court has relied are as follows :

Question 16 (p. 48) — Under what circumstances are daughters entitled to inherit? Are they excluded by the sons or by the widow, or by the near male kindred of the deceased? If they are excluded by the near male kindred, is there any fixed limit of relationship within which such near kindred must stand towards the deceased in order to exclude his daughters? If so, how is the limit ascertained? If it depends on descent from a common ancestor, state within how many generations relatively to the deceased such common ancestor must come.

Answer 16 — All Musalmans.

A married daughter in no case inherits her father's estate or any share in it. An unmarried daughter succeeds to no share in presence of agnate descendants of the deceased, or of her own mother; but if there be no agnate descendants and no sonless widow, the unmarried daughters succeed in equal shares to the whole of their father's property, moveable and immovable, till their marriage, when it reverts to the agnate heirs. If there be a widow and daughters of another wife who has died, the unmarried daughters of the deceased wife succeed to their mother's share till their marriage.

Question 17 (p. 49) — Is there any distinction as to the rights of daughters to inherit (1) the immovable or ancestral, (2) the moveable or acquired, property of their father?

Answer 17 — All Musalmans.

As regards the right of the daughter to inherit, no distinction is made between the moveable and immovable, ancestral and acquired, property of the father. If she inherits at all she takes the whole estate.

The material part of answer 18 (p. 49) is as follows :

Answer 18 — All Musalmans.

A married daughter has no claim upon her father's estate in any case, whether she be widowed, or have children or not, or she and her husband live with her father. An unmarried daughter, if she does not herself inherit her father's estate, is entitled to proper maintenance out of it until her marriage and to the reasonable expenses of her marriage.

These answers are clearly admissible under S. 48, Evidence Act, 1872, being the opinion, as to the existence of a general custom or right, of persons who would be likely to know of its existence if it existed. They are also admissible under S. 85 of that Act, as entries relating to a relevant fact contained in what may be regarded as a public record, made by a public servant in the discharge of his official duty. This Board held in 44 I A 89⁴ at p. 97, in which a similar *riwaj-i-am* relating to the Mahomedan Jats of the Jhang district in the Punjab was concerned, that the statements contained in the *riwaj-i-am* formed a strong piece of evidence in support of the custom therein entered,

subject to rebuttal. In a later case, 10 Lah 86,⁵ the Board further held that the statements contained in the *riwaj-i-am* might be accepted even if unsupported by instances.

On a careful examination of the relevant questions and answers in Wilson's Manual, a few considerations arise in limine which cannot be ignored :

(1) That some of the answers are in conflict with the customs recorded in Rattigan's Digest, notably what is stated in that Digest as the general custom of the province that daughters exclude collaterals with respect to self-acquired property of their father. (2) It cannot be disputed that, in his lifetime, a Mahomedan proprietor (as, for instance, an Awan in the Shahpur district) possesses unlimited power to give away his property to his daughters and their issue. This is clear from Wilson's Manual, p. 71 where it is recorded

a father having no son or son's son, has full power to give the whole of his immovable property to his daughter, daughter's son, sister, sister's son, or son-in-law, or to one of his agnate heirs, without the consent of the other agnates. No distinction is made between ancestral and acquired property.

Again, at page 73, it is stated as regards Awans and miscellaneous Musalmans (Tullas are included in this category)

a proprietor having no son or son's son, can without the consent of the agnate heirs, make a gift of immovable property, ancestral or acquired, divided or not, to a person not related to him,

and an explanatory note is added that among the Awans there is a general feeling that a sonless man is absolute owner of all his property, including his land, and can do with it as he likes, as his agnate heirs are generally his enemies!

If this is the rule, it is difficult to understand why, on the death of such an absolute owner, his married daughters, whom he could have made the objects of his bounty at his will during his lifetime, should be superseded, even with regard to his self-acquired property, by collaterals, irrespective of the degree of remoteness in which they stood. Though Punjab Act, 2 of 1920 ("an Act to restrict the power of descendants and collaterals to contest an alienation of immovable property . . . on the ground that such alienation . . . is contrary to custom") does not apply to alienations made by a female (as in the present case), S. 7 thereof throws light on the absolute right of the proprietor to give away his non-ancestral property. The section applies to the whole of the Punjab, and provides that

4. ('16) 3 A I R 1916 P O 129 : 38 I C 354 : 44 Cal 749 : 44 I A 89 : 45 P R 1917 (P O), *Beg v. Allah Ditta*.

5. ('28) 15 A I R 1928 P O 294 : 113 I O 1 : 55 I A 407 : 10 Lah 86 (P O), *Mt. Vaishno Ditti v. Mt. Rameshri*.

no person shall contest any alienation of non-ancestral immovable property on the ground that such alienation is contrary to custom.

(3) In answer 17 in Wilson's Manual no distinction is made between ancestral and non-ancestral or between moveable and immovable property and the rule is stated as a wide generalisation (in answer 16) with reference to "all "Musalmans" that a married daughter "in no case" inherits her father's estate or "any share in it." This answer is in conflict with numerous decisions of the Punjab Courts (some of them are noticed in a subsequent part of this judgment) which have laid down in clear terms that, in the earlier records of customs throughout the Punjab, rules stated in such wide and general terms must be taken to govern ancestral property only. (4) In the province as a whole, numerous decisions of the Punjab Courts show that daughters generally succeed to the self-acquired property of their father, even to the exclusion of the nearest agnatic relations (as e. g., uncles or nephews), and even as regards ancestral property, it is now well settled that more usually, the fifth degree is found to be the remotest customary limit: see Rattigan's Digest, para. 23, cl. (1), sub-cl. (2) and authorities quoted at p. 84 and following. This general rule, prevalent in the entire province, appears to have found expression in S. 6, Punjab Act, 2 of 1920, which lays down the fifth degree as the limit of collateral relationship able to contest an alienation of ancestral immovable property, on the ground that it is contrary to custom. (5) It is remarkable that in answer 16 as recorded in the English version of the *riwaj-i-am*, no limit is mentioned within which the kindred must stand towards the deceased in order to exclude his daughters, though the question clearly contemplated inquiry into this point. It is not possible to say whether the omission to answer this part of the question was due to the fact that the point was lost sight of in the investigation or whether the answer was really intended to lay down that custom permitted collaterals, however remote (even of the tenth, fifteenth, or remoter degrees), to exclude daughters. Tek Chand J., in the course of an examination of answer 16 in 13 Lah 276⁶ at pp. 296, 297, had occasion to consult the vernacular version of the *riwaj-i-am*. He came to the conclusion that, though the last part of the question was not specifically answered, it was clear from certain

6. ('82) 19 A I R 1982 Lah 157 : 135 I O 769 : 13 Lah 276 : 32 P L R 890, *Khan Beg v. Mt. Fateh Khatun*.

expressions—Chacha (father's younger brother) and Taya (father's elder brother) used in the corresponding vernacular answer, that it was not intended to lay down that collaterals of remote degrees should be preferred to daughters.

This case in 13 Lah 276⁶ (their Lordships have derived considerable assistance from Tek Chand J.'s judgment) deserves to be examined carefully as it related to the Shahpur district and the dispute was also very similar to the one in the present case. The contest there was between married daughters and collaterals of the sixth degree and arose (as in the present case) in connexion with a gift of non-ancestral property by the widows to their married daughters. As in the present case, the collaterals relied on the *riwaj-i-am* in Wilson's Manual, and, with reference to it, Tek Chand J. made some observations which seem to their Lordships very pertinent. He pointed out that it was significant that not a single instance had been cited in the *riwaj-i-am* of married daughters being excluded from succession to non-ancestral property. The learned Judge went on to observe, quoting from a judgment of a Division Bench of the Lahore High Court, that though the entries in the *riwaj-i-am* were entitled to an initial presumption in favour of their correctness, irrespective of the question whether or not the custom as recorded was in accord with the general custom, the quantum of evidence necessary to rebut this presumption would however vary with the facts and circumstances of each case; where, for instance, the *riwaj-i-am* laid down a custom in consonance with the general agricultural custom of the province, very strong proof would be required to displace this presumption, but where, on the other hand, this was not the case and the custom as recorded in the *riwaj-i-am* was opposed to the rules generally prevalent, the presumption would be considerably weakened. Likewise, where the *riwaj-i-am* affected adversely the rights of females who had no opportunity whatever of appearing before the revenue authorities, the presumption would be weaker still, and only a few instances would suffice to rebut it. Their Lordships are in complete agreement with this view, which is confirmed by a weighty pronouncement of Roe J., in 24 P R 1893, p. 124⁷ at p. 131 where that learned Judge, who was regarded as one of the most eminent exponents of the principles of Punjab tribal customs, and had

7. ('93) 24 P R 1893, *Harnarain v. Mt. Doeki*.

himself compiled an important *riwaj-i-am*, observed :

There is no doubt a general tendency of the stronger to over-ride the weak and many instances may occur of the males of a family depriving females of rights to which the latter are legally entitled. Such instances may be followed so generally as to establish a custom, even though the origin of the custom were usurpation; but the Courts are bound to carefully watch over the rights of the weaker party and to refuse to hold that they had ceased to exist unless a custom against them is most clearly established.

In a later case 102 P R 1901, p. 353⁸ at p. 359 a similar caution was uttered by Robertson J., who observed that

the male relations, in many cases at least, have been clearly more concerned for their own advantage than for the security of the rights of widows and other female relatives with rights or alleged rights over family property, and the statements of the male relatives in such matters have to be taken *cum grano salis* where they tend to minimize the rights of others and extend their own.

These views were endorsed by another high authority — Clark C. J. (Reid J. concurring), in 54 P R 1906, p. 208⁹ at p. 210, and, two years later in 86 P R 1908, p. 402¹⁰ at p. 404, where the *riwaj-i-am* under consideration had laid down that daughters were excluded by collaterals, even up to the tenth degree, it was observed :

As the land is rising in value under British rule the land-holders are becoming more and more anxious to exclude female succession. They are ready to state the rule against the daughters as strongly as possible, but if the custom is so well established, it is strange that they are unable to state a single instance in point on an occasion like the compilation of the *riwaj-i-am*, when detailed inquiries are being made and when the leading men are supposed to give their answers with deliberation and care.

A more emphatic warning was uttered a year later in 34 P R 1909, p. 97¹¹ at p. 99 that where the entries in the *riwaj-i-am*

seek to support a custom in defeasance of the rights of persons who were no parties to the declarations i. e., the female relatives of the signatories, it is quite clear that no body of men can deprive another set of right-holders under personal law by their mere *ipse dixit*. No doubt, usurpation successfully carried out for a long time may possibly eventually establish a custom, but it is necessary in such a case to show not merely that certain persons desire that such and such be the custom to the detriment of the rights of others, but that such and such have really become a binding custom, fully established and followed.

With reference to answers in the *riwaj-i-am* (like answer 17 in Wilson's Manual)

8. ('01) 102 P R 1901 : 119 P L R 1901, Sayad Rahim Shah v. Sayad Hussain Shah.

9. ('06) 54 P R 1906 : 74 P L R 1907, Maula Baksh v. Muhammad Baksh.

10. ('08) 86 P R 1908 : 146 P W R 1908, Bholi v. Man Singh.

11. ('09) 34 P R 1909 : 1 I C 691 : 169 P W R 1903 : 121 P L R 1903, Ganpatrai v. Kesho Ram.

which state that no distinction is made in the matter of the daughter's right of inheritance between self-acquired and ancestral property of the father, or between moveable and immovable property, Shadi Lal C. J., in 10 Lah 249¹² at p. 251, remarked that though the entry in the *riwaj-i-am* raised a presumption in favour of the custom recorded therein, it was clear that

the general custom of the province favours the succession of the daughter to the acquired property of her father in preference to collaterals, vide Rattigan's Digest, para. 23, sub-para. (2), and that the custom invoked by the plaintiffs (in that case) must be treated as an exception to the general rule, and for that reason the onus placed upon the daughter was a light one and did not require much evidence to repel it. Their Lordships have thought it desirable to refer, in some detail, to these observations of the Judges of the Punjab Court, because they held eminent positions and some of them had experience of the preparation of official codes of tribal custom. But none of these considerations appear to have been kept in view by the learned Judges of the High Court in this case, who, in arriving at their decision have not only ignored (as will be shown below) the entire body of evidence adduced in the suit, but also a long course of judicial decisions of their own province, extending over nearly thirty years, in which similar questions arose with reference to the tribes in the Shahpur and neighbouring districts and which were uniformly decided against the collaterals of much nearer degree than in the present suit, except in two cases of exceptional character where there was no rebutting evidence at all : see 6 Lah 356¹³ and A I R 1936 Lah 403.¹⁴ As the question at issue affects large classes of the Muslim community, it is, in their Lordships' opinion, of sufficient importance to justify their briefly reviewing a few of these important decisions.

To begin with, there is Ex. D.7 in the case, the judgment of the Chief Court of the Punjab, C. A. No. 665 of 1905 (Rattigan and Lal Chand JJ.) in Samand v. Mt. Jind Waddi, dated 5th May 1906. It related to the Muslim tribe of Majoks of the Shahpur district. The dispute concerned a gift (as in the present case) by the widow of the original owner, and arose between his col-

12. ('28) 15 AIR 1928 Lah 703 : 111 I C 846 : 10 Lah 249 : 30 P L R 668, Sultan v. Mt. Sharfan.

13. ('25) 12 AIR 1925 Lah 482 : 89 I C 656 : 6 Lah 356 : 26 P L R 590, Jawaya Shah v. Mt. Fatima.

14. ('36) 23 AIR 1936 Lah 408 : 164 I C 796 : 33 P L R 807, Gulab v. Umar Bibi.

laterals (the exact degree of relationship is not stated) as plaintiffs, and his widow, sister, and married daughters, as defendants. The land was the acquired property of the owner. The collaterals relied on a *wajib-ul-arz* of 1865 (similar to answer 16 in Wilson's Manual) stating that the daughters of a sonless proprietor succeeded to his landed property and retained possession merely till marriage when the land reverted to the male agnates. The Divisional Judge and the Chief Court both held that though the *wajib-ul-arz* was stated in general terms, its operation, on a proper construction, must be restricted to ancestral property, and that in the case of non-ancestral property the daughter's estate was not limited till marriage, nor was it one for life, but would remain in their line after their death for such time as there existed a male lineal descendant. The suit was accordingly dismissed. This ruling is referred to with approval in 1 Lah 284¹⁵ at p. 291, and also in 13 Lah 276⁸ at p. 292.

The first of these two cases (Broadway and Bevan-Petman JJ.) related to the Sipras of Miana Hazara tahsil Bhera of Shahpur district (the tribe is included in miscellaneous Musalmans in Wilson's Manual). Here too, the dispute was about a gift made by the widow of her husband's land in favour of her daughter and her deceased daughter's son. Plaintiffs, nephews of the owner, sued for a declaration that the gift did not affect their reversionary right after the death or re-marriage of the widow. Some property was found to be ancestral and some not. The nephews relied on entries in the *riwaj-i-am* in Wilson's Manual, pp. 46, 48, 49 (the same as in the present case), against married daughters succeeding to the father's property. The High Court disallowed the collaterals' claim as regards non-ancestral property, holding that (1) as regards the *riwaj-i-am* the entries carried with them certain presumptions of correctness, but, when positive instances were given, the *riwaj-i-am* could not be regarded as overriding them; (2) as regards ancestral property, the general custom was against the daughter succeeding; (3) in the case of self-acquired property, however, the general custom is that daughters are preferred to collaterals. Reference was made to Rattigan's Customary Law, Art. 23, cl. (2), and to the decision Ex. D-7, cited above, and it was

held that there was no reason to doubt the correctness of the dictum in that ruling that similar general entries about custom should be read as referring to ancestral property only. This case is an instance where answer 17 in Wilson's Manual, stating that no distinction exists between ancestral and acquired property of the father and married daughters are excluded from both, was not given effect to, even in favour of such near kindred as nephews. This ruling was followed in 1933 in the decision noted below as Ex. D-6.

The case in 6 Lah 356¹³ (LeRossignol and Fforde JJ.) related to the Sayyads (included in Wilson's Manual in miscellaneous Musalman tribes) of the Shahpur district. The contest was between married daughters and collaterals (the exact degree of relationship is not stated). The property belonged to a Mahomedan who died twenty-two years before the suit and was succeeded by his widow. On her death, mutation was effected in favour of his two daughters. In 1919, on the marriage of one of the daughters, mutation of her share was effected in favour of her unmarried sister. The married daughter subsequently brought a suit against the unmarried daughter for a declaration that, in spite of her marriage, she was entitled to her half share. This claim was decreed on the confession of the unmarried sister. The suit was then brought by the collaterals on the ground that the unmarried sister was entitled to the estate only until her marriage. The trial Court dismissed the plaintiff's claim, holding that the land in suit was non-ancestral, and consequently they had no right to the property in the presence of the daughters. The collaterals preferred an appeal to the Lahore High Court. After the institution of the appeal, the unmarried daughter was married and compromised with the plaintiffs, and the first married daughter remained the only defendant to resist the appeal. It was held by the High Court (1) that, on the evidence, the land in suit was not ancestral qua the plaintiffs; (2) that it was uncompromisingly stated in the answers in Wilson's Manual that daughters did not succeed to their father's estate "in any case" if they were married, and that when an unmarried daughter took the succession, it lapsed on her marriage; (3) that this statement of custom in Wilson's Manual was open to rebuttal, but that the defendants had failed to prove a single instance in which married daughters succeeded to or retained their father's estate; (4) that it was signifi-

15. (20) 7 AIR 1920 Lah 9 : 54 I O 419 : 1 Lah 284 : 10 P L R 1920, Ghulam Muhammad v. Gauhar Bibi.

cant that on the marriage of the first-married daughter the mutation of her share was sanctioned in favour of her unmarried sister. On these grounds the collaterals' claim was decreed.

This ruling has been treated by subsequent decisions of the Lahore High Court as an exceptional case decided on the ground that not a single instance had been proved by the defendants to rebut the presumption arising from the answers in Wilson's Manual. Likewise, the exact degree of the collaterals' relationship does not appear on the record. See the comments on this ruling in 13 Lah 276⁶ at pp. 307, 308, and in the decision Exhibit D-6 (cited below). This case 13 Lah 276⁶ (*Tek Chand and Coldstream JJ.*), related to Awans (first tribe mentioned in preface to Wilson's Manual) in mauza Mardwal in Khushab tahsil of Shahpur district. A reference has been made to this case in an earlier part of this judgment. A Mahomedan landowner died sonless, leaving two widows and daughters from each. After his death, the widows partitioned the property among themselves. Subsequently, each of the two widows gifted her share to her married daughter at different dates. Plaintiffs, collaterals of the sixth degree, instituted two separate suits at different dates impugning the two gifts. The trial Court dismissed both the suits. The collaterals appealed to the High Court. The two appeals were heard together. In the first suit, no oral evidence had been led by the parties. In the second suit, the collaterals produced sixteen witnesses, who made bald statements about the custom, which were rejected by the subordinate Judge as worthless, as none of them was able to cite a single instance in which the collaterals had succeeded in preference to daughters in respect of non-ancestral property. The collaterals, however, relied on answers to questions 16 and 17 in Wilson's Manual. The High Court held (1) that the land was not ancestral; (2) that though the *riwaj-i-am* was entitled to an initial presumption in favour of its entries dealing with this question, on the facts of the case it was of limited value. Referring to questions and answers 16 and 17 in Wilson's Manual and the general answer as governing all Musalman tribes, it was observed that not a single instance where married daughters had been excluded from succession to non-ancestral property had been cited, either in the *riwaj-i-am* or proved at the trial. The judgment then refers (p. 282) to three rulings—one of 1905 (the same as Ex. D-7 above) and two of

1920, where the answers in Wilson's Manual were not followed. It is further stated (p. 310) that there were more than twenty cases in which daughters were proved to have excluded collaterals from succession to the property of their fathers, while there is not a single well-ascertained instance of collaterals as distantly related as the plaintiffs (sixth-degree) succeeding to non-ancestral property in preference to daughters of the last male holder. The plaintiffs had succeeded in proving only three instances of succession of collaterals to non-ancestral property, but in all these cases the plaintiffs were 'near kindred'.

The suit was accordingly dismissed. The remarks at the end of the judgment (p. 310) are valuable as showing that on the authority of Wilson's Manual (answers 16 and 17) and the admission of both counsel in that appeal, the custom discussed in the judgment was the same among all the Musalman tribes of the Shahpur district. 15 Lah 73¹⁶ (*Dalip Singh J.*), also related to the Awans of tahsil Khushab, Shahpur district. The contest there was between the daughters (defendants) and collaterals of the fifth degree (plaintiffs). The case followed the decision in 13 Lah 276.⁶ The judgment goes on to add that the twenty instances relied on in the judgment in that case were of such a character that they would apply to the fifth-degree collaterals as much as to the sixth-degree, and that out of the three contrary instances in that case only one was helpful to the plaintiffs. It was held that the presumption in the *riwaj-i-am* had been rebutted and that the daughters succeeded.

Mt. Jallo v. Mt. Sajjadan, (1933) (Exhibit D-6 in the present case), related to the tribe of Khokhars (fourth tribe mentioned in preface to Wilson's Manual) of Kalas, tahsil Bhalwal, Shahpur district. This is a judgment of the District Judge at Sargodha, Shahpur district. The contest was between a daughter and the sons of another daughter as plaintiffs and collaterals of the fifth degree as defendants. In addition to the usual defences, the collaterals pleaded a local custom of the Shahpur district under which daughters and their sons were excluded even if the land was not ancestral. The first Court held that the land was not ancestral, that defendants were collaterals of the fifth degree and daughters were preferential heirs, and their suit was decreed. On appeal, the District Judge confirmed the findings, and stated, as regards the custom of the Shahpur district, that the evidence for the col-

16. ('34) 21 AIR 1934 Lah 404 : 150 I O 786 : 15 Lah 73 : 36 P L R 449, *Mt. Bhag Bhari v. Mohammad*.

laterals consisted (1) of entries in the revenue record; and (2) of oral evidence of nine witnesses, but that not one single instance had been cited to prove the preference of collaterals over daughters. He held that if the property was ancestral, the collaterals would succeed, but that if the property was not ancestral, the general custom of the province was in favour of the daughters, and that the local custom, contrary to the general custom, had not been established, as no instance of daughters' exclusion was proved. As for the record of the custom which stated (like the relevant answers in Wilson's Manual) that daughters did not obtain any share of the father's property, the learned Judge remarked that no distinction was made in it between ancestral and non-ancestral property and therefore following the case in 1 Lah 284,¹⁵ he held that the operation of the statement must be confined to ancestral property. Turning to the facts of the case before him, the learned Judge held that, on account of the various instances proved in the case, the presumption raised by the *riwaj-i-am* in favour of collaterals, so far as succession to non-ancestral property was concerned, had been rebutted. The suit was accordingly decreed. The Judge relied on the case in 13 Lah 276⁶ as being "most important."

Exhibit D-8 (referred to in the trial Court's judgment in this case) is a decision of the Lahore High Court relating to the *mekans* (tribe included in miscellaneous Musalmans) of the Shahpur district. Plaintiffs there were collaterals of the seventh degree as against married daughters. It was held that, according to the custom prevailing amongst the *mekans*, and the Mahomedan land-holders of the Shahpur district generally, collaterals were excluded by married daughters in succession to the non-ancestral property of a sonless proprietor. It was also pointed out that, according to answers 16 and 17 in Wilson's Manual, the same custom existed amongst all the Musalman tribes of the district (except the Tiwanas and Sayads, in whose cases there were minor variations). It was held that the plaintiffs (seventh-degree collaterals) were excluded by the daughters. The judgment followed 1 Lah 284,¹⁵ 13 Lah 276⁶ and 15 Lah 73.¹⁰

The decisions cited above have been referred to in some detail because they were all from the Shahpur district and related to the Musalman tribes mentioned in Wilson's Manual. But the Lahore High Court

have, in some of their decisions relating to the Shahpur district, referred also to rulings from the other districts of the Punjab where, owing to the contiguity of the district or analogous circumstances, a similarity of customs was found to have existed, tending to prove that, with regard to non-ancestral property, the custom was more or less general in the whole province of the Punjab that daughters, married or unmarried, excluded collaterals beyond the fifth degree. A few of these decisions which relate to the material period of 1905-1936 may be usefully noticed here.

8 Lah 584³ (Campbell and Tek Chand JJ.), was a case of a Kanj Jat of mauza Burewal in the Amritsar district. The contest was between collaterals of the sixth degree (plaintiffs) and the daughters (defendants) of a daughter's son appointed by the widow of the owner, under his directions as a son to her husband. The subordinate Judge held (and the High Court confirmed) that the land was not ancestral and the appointee took it as his absolute property with a complete power of disposal over it, and that consequently, on the latter's death, it would descend to his daughters, and plaintiffs had no right to it; that the rule of reversion mentioned in the *riwaj-i-am* of the Amritsar district, prepared in 1913-1914, stating (like the answers in Wilson's Manual) that the collaterals excluded the daughters even with regard to non-ancestral property, had no application where the property was non-ancestral in the hands of the appointee and his power of disposal over it was absolute. In support of this view, reference was made to para. 55 of Rattigan's Digest.

10 Lah 249¹² (Shadi Lal C. J., and Johnstone J.), related to Awans of the village Khardar in the district of Jhelum. The owner was succeeded by his widow, who made a gift of a plot of the land to her daughter. Plaintiffs, brothers and a nephew of the owner, brought the suit, impugning the alienation. The property was admittedly self-acquired. Plaintiffs relied on an entry in the *riwaj-i-am* of the district (similar to answer 16 in Wilson's Manual), limiting the unmarried daughter's interest until her marriage, without distinction between self-acquired and ancestral property or moveable or immovable property. The subordinate Judge decided in favour of the daughters (the High Court confirmed the decision), holding that it was clear that the general custom of the province favoured the succession of the daughter to acquired property

of her father in preference to collaterals. (Reference was made to Rattigan's Digest, para. 23, sub-para. (2).) The subordinate Judge thought that a declaration in the *riwaj-i-am* that a married daughter cannot inherit even the self-acquired property of her father "verges on an absurdity"; no instances were mentioned in support of it. He added that the author of the *riwaj-i-am* had himself stated in the preface that his code

must not in all cases be regarded as a correct record of the customs actually existing and that the more intelligent tribesmen who usually act as spokesmen on an occasion of this kind sometimes allow their opinion as to what customs are expedient to override their knowledge of the customs as they really are.

The daughter produced evidence of at least four instances in her favour, as against one contrary instance proved by the collaterals, but the latter related to property which was jointly acquired by the deceased owner and his brother and went to the collaterals without any contest by the daughters. It may be noted that this case was treated by Tek Chand J. in 13 Lah 276⁶ at page 287 (case of Awans of Shahpur) as of particular importance, as the question for decision in this ruling was precisely the same as before him and related to the neighbouring district of Jhelum: 10 Lah 485¹⁷ (*Shadi Lal C. J. and Agha Haidar J.*), was a case of Jats of the Sialkot district. The suit was brought by the daughter for a declaration that after the death of her mother she would inherit the property. Her claim was opposed by the nephew. The land was non-ancestral. The trial Judge, upon examination of the evidence, came to the conclusion that among the Jats of the Sialkot district, from where the original owner had migrated, the daughter is by custom entitled to succeed to the self-acquired property of her father in preference to his nephew. This finding was not challenged before the High Court: 10 Lah 489¹⁸ (*Broadway and Harrison JJ.*), was also a case of a Jat in the Sialkot district. The contest was between a married daughter and her father's brothers. On a reference by the Collector, the daughter filed the suit for the usual declaration. The trial Court and the High Court both admitted her claim, holding that by the custom of the Jats of the Sialkot district a married daughter succeeds to the self-acquired property of her

father in preference to collaterals. The uncles had relied on a *riwaj-i-am* of the Sialkot district (similar to answer 16 in Wilson's Manual) stating that married daughters did not inherit in the presence of collaterals. The High Court observed that a presumption of correctness attached to such an entry, but in the case before it the entry was qualified by the following remarks:

This is the general rule, but, under the influence of judicial decisions, some people assert that daughters succeed in preference to collaterals of the fifth or more remote degree. Mughals assert that agnates of the fourth degree are excluded by the daughters.

The Judges gave effect to this qualification on finding that eight instances were cited in the *riwaj-i-am* in which daughters inherited to the exclusion of collaterals of varying degrees, and that in the case itself two more contested instances were proved in the daughter's favour. The case, 10 Lah 485¹⁷ was relied upon as affording strong evidence in support of the qualification of the custom set out in the *riwaj-i-am*: 13 Lah 404³ (*Addison and Hilton JJ.*), related to Mahomedan Rajputs of Panipat, Karnal district. The contest was between collaterals of the sixth-degree (plaintiffs) and a daughter (defendant 1) and widow (defendant 2). There was a will by the owner in favour of the daughter. The suit was for a declaration that the will was of no effect against reversionary rights, as the property was ancestral and there was a general custom excluding daughters and also a special custom of the Rajputs of Panipat that daughters married outside Panipat did not inherit. The subordinate Judge dismissed the suit, holding that the will was genuine and valid, the property was non-ancestral and there was a general custom preferring daughters to collaterals, and that the special custom pleaded was neither ancient nor reasonable. The High Court held that the property was not ancestral and that plaintiffs had not proved that the general custom favoured sixth-degree collaterals even if the property was ancestral. The plaintiffs had relied upon a *riwaj-i-am* of Panipat of 1880, stating that "daughters succeed provided they be married in Panipat proper and are alive." This *riwaj-i-am* was supported by one instance proved in the case. Notwithstanding this, the High Court, following its previous decisions in 1 Lah 284¹⁵ and 7 Lah 124¹⁹ limited the operation of the *riwaj-i-am* to ancestral property as no mention of self-acquired property was made in it.

19. ('26) 13 AIR 1926 Lah 210: 95 IC 337: 7 Lah 124: 27 P L R 154, *Sham Das v. Mt. Moolo Bai*.

17. ('29) 16 AIR 1929 Lah 58: 116 IC 189: 10 Lah 485: 30 P L R 678, *Shahamad v. Mt. Muhammad Bibi*.

18. ('29) 16 AIR 1929 Lah 465: 118 IC 393: 10 Lah 489: 30 P L R 618, *Said v. Mt. Said Bibi*.

The High Court proceeded to observe that assuming that the property was ancestral, the daughter was unmarried at her father's death when succession opened out and the property having vested in her, her subsequent marriage would not divest it. It is interesting to compare the last-mentioned principle with answer 16 in Wilson's Manual, which states that unmarried daughters succeed to their father's estate but that on their marriage it reverts to the agnates: AIR 1936 Lah 339²⁰ (*Tek Chand and Skemp JJ.*), related to Kalon Jats of the Sialkot district. The contest was between brother's son's sons (plaintiffs) and daughter (defendant). After the death of the owner and his widow, the Collector ordered mutation in favour of the daughter. The brother's son's sons brought the usual suit against the daughter, claiming, *inter alia*, that according to the custom prevailing in the tribe, collaterals succeeded to self-acquired property to the exclusion of daughters. The subordinate Judge found against plaintiffs on all points and dismissed the suit. The High Court held that the daughter was legitimate and therefore had a right to succeed in preference to the brother's son's sons. The collaterals had relied upon a *riwaj-i-am* of the Sialkot district of 1916, with reference to which the High Court observed that, though the initial presumption must be in favour of its correctness, the lower Court had rightly held, after careful examination of the evidence on the record and also the previous decisions, that the daughters had succeeded in displacing the presumption. It is significant that the High Court proceeded to add that counsel appearing for the collaterals

conceded that there were several instances of daughters excluding collaterals in succession to non-ancestral property of their sonless fathers, while there was not even one instance in support of the answers as recorded. This entry in the *riwaj-i-am* has been examined in several cases by this Court and in every one of them it has been found that it was not in accord with the actual prevailing custom.

Reliance was placed, among other rulings, on 10 Lah 485¹⁷ and 10 Lah 489.¹⁸ It is interesting to compare the last ruling with another case reported in the same volume, AIR 1936 Lah 409¹⁴ (*Addison and Abdul Rashid JJ.*) This case related to a Dillu Jat of the village of Godha in the Sialkot district. The contest was between collaterals of the 11th degree (far remoter than any collaterals concerned in any of the previous

decisions) as plaintiffs and a married daughter (donee from the widow) and her husband (donee from her) as defendants. The trial Court dismissed the suit, holding that the plaintiffs were very remote collaterals, that the land was not ancestral and that under the custom the daughter was entitled to succeed. It is to be noted that no evidence was produced by either party on the question of custom and the subordinate Judge decided the issue on the basis of the general custom of the province as made out in the previous decisions of the Lahore High Court (cited above) dealing with the different tribes in the Sialkot and other districts. The High Court reversed the decision and decided in favour of the plaintiffs, relying entirely on the *riwaj-i-ams* of 1865, 1895 and 1916, holding that these *riwaj-i-ams* had remained unchanged during all these years and were clearly to the effect that married daughters did not inherit in the presence of collaterals "in any case," and, as they were not rebutted by the contrary evidence in the case, the *riwaj-i-ams* must be given effect to. It is clear that this case is an extreme instance where collaterals of the 11th degree succeeded. It ignores the previous decisions, and some of them (cited above) from the same district of Sialkot, where collaterals of a much nearer degree, like nephews were excluded by the daughters with reference to self-acquired property. The decision likewise fails to take note of the interpretation adopted in several of the previous decisions that where a *riwaj-i-am* makes no distinction between ancestral and self-acquired property and states, as a wide generalization, that daughters do not succeed in any case, it must be limited to ancestral property. It is to be noted that in this case, as in 6 Lah 356,¹³ there was not a single instance adduced to rebut the presumption created in favour of the collaterals by the *riwaj-i-am*. It is on this ground that Bhide J. in his differing judgment in 18 Lah 594¹ at p. 605 rightly describes this case as of an exceptional character.

It now remains to consider the Full Bench case in 18 Lah 594¹ (differing judgments of Coldstream and Bhide JJ. and Full Bench decision of Young C. J., Monroe and Din Mohammad JJ.) As the High Court in the present case has treated this ruling as an authority for ignoring the previous judicial decisions, it is necessary to examine closely the facts and effect of this ruling. The case related to the Jats of Daska tahsil in Sialkot district. The contest

20. (186) 28 A I R 1936 Lah 389 : 161 I O 24 : 16 Lah 985 : 88 P L R 509, *Mahi v. Mt. Barkata*.

was between a married daughter (plaintiff) and collaterals of the fourth degree (defendants). The land was non-ancestral. The trial Court decreed the suit, holding that the land being non-ancestral the custom favoured the daughter's preferential right. This decision was upheld on appeal by the District Judge. The collaterals appealed to the High Court, and that Court dismissed the suit. It is to be noted that neither party had proved any specific instances in the case, so there was no rebutting evidence against the presumption raised in favour of the collaterals by the answers in the *riwaj-i-am* relating to the district. The only material question was whether previous decisions of the Lahore High Court of a character contrary to the custom recorded in the *riwaj-i-am* would be sufficient evidence to rebut the presumption. None of the earlier decisions, for instance, those cited above, nor even those relating to the Jats in the Sialkot district, were noticed in the Full Bench judgment, which referred only to two previous decisions: one of 1922, which Young C. J. (who delivered the judgment of the Full Bench) thought was based on a wrong view of the law; and the other of 1928, which was held to be too recent to prove a custom. The *riwaj-i-am* relevant to the suit, which was noticed and commented on in some of the earlier decisions cited above, was clear so far as it went, but its qualifications were not given effect to as was done in some of the earlier decisions. There was a difference of opinion between Coldstream and Bhide JJ., and on a reference to the Full Bench, the reasoning adopted by the former Judge was virtually approved, but several vital considerations urged by Bhide J. in his differing judgment do not appear to have received adequate consideration in the Full Bench judgment.

If the Full Bench decision is intended to lay down the rule that a *riwaj-i-am*, being presumptive evidence, cannot be over-ridden by recent instances, either in the form of specific cases proved at the trial or the decisions of the law Courts, their Lordships have little comment to make on it. The case cannot, however, be treated as an authority for the view that judicial decisions, even if they are not of recent date, cannot be treated as evidence against the statements in the *riwaj-i-am*. A judicial decision, though of comparatively recent date, may contain, on its records, evidence of specific instances, which are of sufficient antiquity to be of value in rebutting the

presumption. In such a case, the value of the decision arises from the fact not that it is relevant under Ss. 13 and 42, Evidence Act, as forming in itself a "transaction by which the custom in question was "recognized, etc., etc." but that it contains, on its records, a number of specific instances relating to the relevant custom. To ignore such judicial decisions merely on the basis of the *riwaj-i-am* would add greatly to the perplexities and difficulties of proving a custom.

Their Lordships are not convinced that Young C. J.'s reference to the English rule, stated in Blackstone's Commentaries, that "a custom, in order that it may be legal and binding, must have been used so long that the memory of man runneth not to the contrary" was either apposite or useful, when applied to Indian conditions. It is undoubted that a custom observed in a particular district derives its force from the fact that it has, from long usage, obtained in that district, the force of law. It must be ancient; but it is not of the essence of this rule that its antiquity must in every case be carried back to a period beyond the memory of man—still less that it is ancient in the English technical sense. It will depend upon the circumstances of each case what antiquity must be established before the custom can be accepted. What is necessary to be proved is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of the particular district. Having regard to the circumstances under which local customs have arisen and do arise in India, both with reference to Muslims and Hindus, and the ease and frequency with which people migrate from one district or province to another, it would, in their Lordships' opinion, create great perplexity in the already uncertain character of customary law to require that, in every case, the antiquity of a custom must be carried back to a period which is beyond the memory of man. Insistence upon such proof would also involve a complete ignoring of the caution, which was uttered in a judgment of this Board in 45 I A 10²¹ at p. 14, where their Lordships adverted to the difficulty of applying "the strict rules that govern the establishment of custom in this country to circumstances which find no

21. (17) 4 AIR 1917 P C 181 : 43 I C 306 : 45 Cal 450 : 45 I A 10 : 12 SLR 104 (P C), Abdul Hussein Khan v. Bibi Sona Dero.

analogy here." Likewise, their Lordships do not find themselves in agreement with the view of the Full Bench that the effect of the statements in the *riwaj-i-am* was not weakened by the fact that women had no opportunity of being consulted by the officer compiling the customary law or by the fact that the custom recorded was not in conformity with the general customary law. The presumption enjoyed by the *riwaj-i-am* was, in their Lordships' opinion, weakened to the extent of both these considerations, though the degree of the weakening would depend upon the facts of each case. Their Lordships prefer, in this behalf, the observations of the Punjab Judges, cited in a previous part of this judgment, which are of a contrary character.

Whatever value the Full Bench decision might have with reference to the customs of the Sialkot district, the High Court in the present case was in error in accepting it as an authority for excluding from consideration the several instances, both judicial and otherwise, which were proved in this case with reference to the customs of the Shahpur district. By no straining of language could these decisions be described as recent. They commence from 1905-06 and range over a period of nearly thirty years. In many of these decisions the claimants in the position of the daughters proved specific instances of their superseding collaterals of varying degrees of remoteness, sometimes even nephews, with reference to non-ancestral property. The case in A I R 1936 Lah 403,¹² on which the Full Bench judgment relied, was as shown above, of an exceptional character and could hardly be regarded as indicating any rule of custom of general application as against numerous instances of a contrary character. Besides, both parties had led, in the present case, evidence of specific instances which had received careful consideration in the judgment of the subordinate Judge. The High Court virtually ignored all this evidence on the basis of the Full Bench judgment. Their Lordships have examined this evidence and they agree with the view of the subordinate Judge that the evidence produced by the daughters was of a more convincing character.

For the reasons indicated in this judgment, their Lordships are of opinion that the true legal position was that, the property being non-ancestral, the initial onus lay on the plaintiffs to prove that the general custom in favour of the daughters' succession had been varied by a special custom

enabling the plaintiffs to exclude the daughters and that the plaintiffs have not discharged this onus. Their Lordships would add that even if it be held that the answers in Wilson's Manual raised an initial presumption against the daughters, having regard to the considerations mentioned in this judgment, it was a weak presumption, which has been sufficiently discharged by the evidence adduced in the case. Their Lordships will accordingly humbly advise His Majesty that the appeal be allowed, that the decree of the High Court be reversed and that of the subordinate Judge restored. The respondents will pay the appellants' costs in the High Court and before this Board.

K.S./R.K.

Appeal allowed.

Solicitors for Appellant—*Hy. S. L. Polak & Co.*
Respondent Ex parte.

A. I. R. 1941 Privy Council 33

(From Calcutta: A. I. R. 1936 Cal. 744)

30th October 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

Privy Council Appeal No. 7 of 1939; Bengal Appeals Nos. 2 to 6 of 1937.

*Sri Sri Iswar Ram Chandra Bigraba
Thakur and another — Appellants*

v.

Bengal Duars Bank Ltd.—Respondents.

Hindu law—Religious endowment—De facto shebait of idol whether can sue on behalf of idol to set aside permanent leases granted by hereditary shebait (*Quære*).

Whether a de facto shebait of a private idol can maintain a suit on behalf of idol to set aside permanent leases granted by hereditary shebait.

[P 34 C 1, 2]

[*Their Lordships did not consider the point as the pleadings were silent on the matter.*]

Sir Thomas Strangman and C. Bagram —

for Appellants.

W. Wallach — for Respondents.

Lord Thankerton.—The appellant, Prasanna Deb Raikat, sues for himself and as shebait for an Idol, Sri Sri Iswar Ram Chandra Bigraba, who is thus in name a plaintiff and appellant, in the five suits which are the subject of the five consolidated appeals against a judgment and five decrees of the High Court of Judicature at Fort William in Bengal, dated 16th June 1936, which affirmed a judgment and five decrees of the subordinate Judge of Jalpaiguri, dated 23rd December 1932, dismissing the five suits with costs. In three of the

suits Prasanna Deb Raikat, who may be referred to as the appellant, seeks to set aside permanent leases at fixed rents granted by Sitaram Bairagi, whom the appellant — in view of the findings of the Courts below — does not now dispute to have been hereditary shebait of the Idol. In the other two suits the appellant seeks ejectment of temporary tenants, on whom notice to quit has been served.

The appellant's original grounds of suit were that the Idol had been installed by an ancestor of his, who had endowed it with property which included the lands in suit, and had placed a priest in charge of the Idol and the property, but that the ancestor retained control and that there was no hereditary right of succession in the priests. It was stated that Sitaram had succeeded his father as priest, but that, about 1883, the Rajah, being dissatisfied with Sitaram, had removed him and had appointed Budhu, Sitaram's stepmother, in his place; that, in 1909, on Budhu's death, while the estate was under the Court of Wards Sitaram had got back into possession and had subsequently created these five tenancies; that on Sitaram's death in 1925, he had been succeeded by his son, Khagendra, who had executed a deed of surrender of the Idol and the property to the appellant on 15th November 1925, and that the appellant had removed the idol to his own house and had given the notices to quit and had filed the five suits at various dates in 1929 and 1930. As regards the property in suit, the appellant claimed that it was debuttar property of the Idol and that, as shebait, he was entitled to recover possession and, if it was not debuttar property, that it belonged to the appellant personally. At the hearing before this Board, mainly by reason of the facts concurrently found by the Courts below, the appellant had to concede that the Idol was installed by one of Sitaram's ancestors and that Sitaram and his ancestors were shebaits of the Idol; that an ancestor of the appellant, who had endowed the Idol with the property, had imposed no conditions as to its management or as to the appointment of shebaits, at the time of the endowment; and that the so-called deed of surrender by Khagendra was a nullity and that the appellant was not the shebait of the Idol.

In these circumstances the appellant was driven to find some ground to justify his insistence in these suits on behalf of the Idol and he accordingly sought to maintain that he was entitled to insist as de facto

shebait of the idol, and he relied on two decisions of this Board : 60 I A 124¹ and 62 I A 47.² This ground is not raised in the appellant's pleadings, and was submitted for the first time in the High Court. The High Court distinguished these cases on the ground that they related to the mohantship of a math and not to a shebaitship of an endowment, and on the facts of the cases, and pointed out that the plaintiffs were not based on the appellant's possession as de facto shebait. They rejected the contention. While distinction may well be drawn between the case of a math and that of a private Idol their Lordships find it unnecessary to consider the question in these appeals, for not only are the pleadings silent on the matter, but the appellant had also to admit that there was no evidence of his having in fact acted in management of the Idol's property, as, for instance, by the collection of rents. This contention accordingly fails. Their Lordships will therefore humbly advise His Majesty that the judgment and decrees of the High Court should be affirmed and that the consolidated appeals should be dismissed with costs.

D.S./R.K.

Appeals dismissed.

Solicitors for Appellants — T. L. Wilson & Co.

Solicitors for Respondents —

Douglas Grant & Dold.

1. ('33) 20 A I R 1933 P C 75 : 142 I O 214 : 12 Pat 251 : 60 I A 124 (P C), Ram Charan Das v. Naurangi Lal.

2. ('35) 22 A I R 1935 P C 44 : 153 I O 1100 : 57 All 159 : 62 I A 47 (P C), Mahadeo Prasad Singh v. Karia Bharthi.

A. I. R. 1941 Privy Council 34

(From Lahore)

2nd December 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

Privy Council Appeal No. 97 of 1938.

Malik Mohammad Ikhtiar and others
— Appellants

v.

Himtu Ram and others — Respondents.

Sind-Sagar Doab Colonization Act (1 of 1902), S. 3—Agreements under Act with village proprietors for surrender of lands on statutory terms recorded in wajibularz of 1902 and 1926—Scheme of Act abandoned and Act repealed in 1929—Repeal of Act held did not render agreements invalid by reason of S. 4, Punjab General Clauses Act, so as to revive proprietors' right during interim period to reclaim lands—Agreements recorded in wajibularz held operated independently of Act and were binding on proprietors during period of transition and pre-

cluded them from reclaiming shamilat lands during that period.

The agreements under the Sind-Sagar Doab Colonization Act entered into with the village proprietors for surrender of the lands on the statutory terms were recorded in the wajibularz of two settlements of 1902 and 1926. The scheme of the Act was finally abandoned and the Act was repealed in 1929. The proprietor claimed to be Adna Malik of shamilat lands reclaimed by him during the interim period :

Held that under S. 4, Punjab General Clauses Act the repeal of the Sind-Sagar Doab Colonization Act did not render the agreements with the proprietors thereunder invalid so as to revive the proprietors' right during the interim period to reclaim shamilat lands. [P 35 C 2]

Held further that apart altogether from the effect of repeal the agreements recorded in the wajibularz operated independently of the Act and expressly determined the rights of the parties during a known period of transition. The parties therefore were bound by the agreements and were precluded from reclaiming shamilat lands during the interim period : 38 P L R 133, *Foll.*

[P 35 C 2; P 36 C 1]

R. Ritson — for Appellants.

Respondents Ex parte.

Lord Atkin. — These are consolidated appeals from the High Court of Judicature at Lahore who affirmed a decree of the senior subordinate Judge at Mianwali dismissing the suit of the plaintiffs so far as the present dispute is concerned. The plaintiffs are some of the proprietors in various villages in the Mianwali District. According to the respective village wajibularz prepared at the time of the first settlement in 1878 a proprietor had the right under certain conditions to reclaim the Shamilat (waste land) of the village and become Adna Maliks of the land. The plaintiffs claim that in the last 30 years they have reclaimed such land in their respective villages and are entitled to the rights stated in the relevant wajibularz. But the original position as defined in 1878 was altered in consequence of a scheme of the Government of the Punjab to make a canal in the Sind-Sagar Doab for the purpose of irrigating tracts in that district. In furtherance of the scheme the Sind-Sagar Doab Colonization Act was passed in 1902. Amongst other provisions it empowered the Government to make agreements between proprietors in the district for the surrender of their lands to Government on condition that they would receive back an area equal to one-fourth in the improved land. Such surrenders however were only to take effect on and from the date on which the excavation of the proposed canal should be begun.

In 1901, after the Act had received the assent of the Lieutenant-Governor, agree-

ments were entered into by the proprietors of all the lands in the villages in question for the surrender of the lands on the statutory terms. The agreement contained the term that from the date of the agreement up to the date of the surrender no one should notwithstanding any law or custom to the contrary acquire or be considered entitled to either proprietary or occupancy tenancy rights in the said lands. So far the agreement was with the Government but at the second regular settlement in 1902 the wajibularz in each case records the agreement between the villagers in this form :

We the proprietors of the village have signed the agreement under the Sind-Sagar Doab Act of 1902 No one can acquire proprietary rights in the village Shamilat till then.

The same agreement is recorded in the wajibularz prepared at the third regular settlement in 1926. No one disputes that all the parties were bound at the time by the agreements so recorded in the respective wajibularz, whose function in the Punjab at least is amongst other things to record village agreements of the kind. The project of the canal however was never carried into effect. The excavation was never begun: and in 1929 when the scheme had been finally abandoned the Sind-Sagar Act of 1902 was repealed (Act VI of 1929). The plaintiffs claim that by reason of the repeal the rights as in 1878 revived and must be taken never to have been affected. They had in fact during the interim period been engaged in reclaiming waste lands, and they now seek to enjoy the rights to become proprietors of the lands so reclaimed as though the various agreements had not been made. The Act, it is said, once repealed, is to be taken never to have been passed. One sufficient answer to this contention is that the effect of repeal is now determined in the Punjab by the Punjab General Clauses Act, 1898, S. 4, which provides that unless a different intention appears repeal shall not (b) affect the previous operation of any enactment so repealed or anything duly done or suffered thereunder, or (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any enactment so repealed. But apart altogether from the effect of repeal the agreements recorded in the second and third wajibularz operate independently of the Act. They expressly determine the rights of the parties during a known period of transition. Until the surrender under the Government agreement the parties agree that the ordinary rights are not to operate.

The plaintiffs must be held to their agreement: a result which is the more clearly just because as pointed out by the Courts in India the other proprietors acting on their agreement have lost rights of preventing the plaintiffs from acquiring the rights over the land they now claim.

Their Lordships find themselves in agreement with the reasons given by the subordinate Judge in these cases, and by the High Court in their judgment in a previous case in 38 P L R 133,¹ which was pronounced on a similar claim and which they followed in the present case. Their Lordships will humbly advise His Majesty that these appeals be dismissed. The respondents entered an appearance, but did not lodge a printed case, nor were they represented at the hearing. The appellants must pay such costs as the respondents have properly incurred.

G.N./R.K. *Appeals dismissed.*

Solicitors for Appellants —

Douglas, Grant and Dold.

Respondents Ex parte.

1. ('35) 163 I C 864 : 38 P L R 133, Ahmad Khan v. Jiwana Ram.

* A. I. R. 1941 Privy Council 36

(From Patna)

2nd December 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

Privy Council Appeal No. 72 of 1939; Appeal No. 21 of 1938.

Jagadamba Loan Co. Ltd. — Appellants
v.

Raja Shiba Prasad Singh and others
— Respondents.

* Lessor and lessee—Lessee mortgaging leasehold interest — Mortgagee is not liable for burdens of lease by reason of privity of estate or contract whether or not he enters into possession.

Since in the case of a mortgage a legal interest remains in the mortgagor, the interest taken by the mortgagee of leasehold interests is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate or contract between him and the lessor. Nor can privity of estate result from his entry into possession. Since the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants and cannot without appointment be liable for any part thereof whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor any part of the burdens of the lessee : A I R 1939 P C 14, *Rel. on* ; (1819) 1 Br & B 238, *Ref.*

[P 37 C 2; P 38 C 1]

J. M. Fringle — for Appellants.

C. S. Rewcastle and R. K. Handoo —

for Respondents.

Sir George Rankin. — The controversy in this case has reference to 650 bighas of coal land in mouza Jinagara in the district of Manbhum in Bihar. In these, the appellants, the Jagadamba Loan Co., Ltd., are mortgagees of certain leasehold interests which were granted by the Jharria Raj as zemindar to one Charles Smith upon the terms of two kabulyats dated 24th April 1907. By one of these instruments Charles Smith took settlement of the surface rights for 999 years at an annual rent of Rs. 650: by the other the sub-soil rights were settled with him for the same period upon certain terms as to payment of royalty which need not here be set out. The rent for the surface rights was secured by a provision that the leasehold land remains wholly hypothecated for the amount of rent and the amount of rent will be treated as the first charge.

As regards the sub-soil rights the provision was

that for the amount of royalty the leasehold land and the machineries remain wholly hypothecated. If I make default in payment of the amount of royalty you will be competent to realise the same by selling the leasehold land.

The appellants' mortgage is dated 4th February 1920. It was executed by the lessee Charles Smith. It recited that several sub-leases had in the meantime been granted by him one being in favour of the Jinagara Coal Co., Ltd. It provided that the appellants should from time to time make advances upon a cash credit loan account and that Charles Smith the mortgagor should repay the same with certain interest on 4th February 1923. Subject to a proviso for redemption it conveyed to the appellants all the estate and interest of the mortgagor including his right to rent and royalties from sub-leases. The mortgagor covenanted that during the subsistence of the security he would pay all rents, royalties, taxes, etc., and observe the covenants of the head leases. In case of the mortgagor's default in payment of the principal and interest when due the appellants were to be entitled to enter into possession of the mortgaged premises and receive the rents, issues and profits thereof, and in case of the mortgagor's default in payment of the rents, royalties or taxes due in respect of the lands the appellants were to be at liberty to enter into possession without being accountable as a mortgagee in possession. It is agreed that the appellants eventually collected certain rents and profits from sub-lessees of Charles Smith and in this sense entered into possession; but the dates and other particulars of the appel-

lants' action do not appear from the record submitted to the Board. It is not suggested that the appellants at any time paid rent to the Jharia Raj in respect of the leasehold interests in mortgage to them.

The suit out of which this appeal arises was brought in the Court of the subordinate Judge at Dhanbad on 20th April 1928. It was brought on behalf of the Raj as lessor against Charles Smith (defendant 1) as lessee and certain other parties are sub-lessees. The appellants were not originally impleaded: they were added as parties on 4th January 1929, but took no steps to contest the suit until after it had resulted in a sale as hereafter mentioned. The plaintiff claimed large sums as due to the Raj for rent and royalty in arrear in respect of the 650 bighas, prayed that an account of the raisings of coal should be had to ascertain the sums due for royalty, claimed that the arrears were a first charge on the leasehold properties, and asked for enforcement of the charge by sale. Certain accounts having been taken as directed by the trial Judge on 14th June 1929, a preliminary decree for sale was made on 9th December 1929, and a final decree on 30th August 1930. The sale took place on 25th June 1931. After setting off the sale proceeds against the amount due to the Raj, a large sum remained due and unpaid, and on 23rd June 1934, application was made on behalf of the Raj under O. 34, R. 6, Civil P. C., for a personal decree for the deficiency against the estate of Charles Smith the lessee (who had died pending suit), against one of his sub-lessees, and against the appellants. The deficiency was said to amount to a lac of rupees.

This claim was resisted by the appellants who lodged an objection dated 28th July 1934, maintaining that between themselves and the Raj as lessors there was neither privity of contract nor of estate. The learned subordinate Judge on 6th December 1934, upheld the objection and refused to make a personal decree against the appellants, but on appeal the High Court at Patna (Terrell C. J., and Fazl Ali J.) reversed his decision and passed a decree on 18th February 1935, against the appellants for the sums due to the Raj for rent and royalties in respect of the six years before suit. From this decree an appeal has now been brought to His Majesty in Council. The appellants, as a new ground of objection in addition to those previously insisted on, have relied upon the fact that the plaintiffs agreed to exclude from the sale the interest of certain sub-

lessees, and say that in any case the property which was included in the decree for sale was neither "the mortgaged property nor a sufficient part thereof" within the meaning of R. 5 (3) of O. 34. Whether upon this new ground the appellants could resist a personal decree for the deficiency under R. 6 of that order, is however a question which their Lordships do not find it necessary to discuss or decide.

Since the decision of the High Court in this case, the position of a mortgagee of leaseholds has been considered by the Board in 66 I A 50.¹ It was there held that in India even in the case of an English mortgage a legal interest remains in the mortgagor: hence the interest taken by the mortgagee is not an absolute interest and is not such as to render him liable for the burdens of the lease by reason of privity of estate. In that case however the mortgagees had not entered into possession of the properties mortgaged. In the present case no question arises of novation by reason of the appellants having paid rent to the Raj or otherwise. Their Lordships have however to consider whether the appellants have become liable for the rents and royalties by reason of their entry into possession of the mortgaged property. They are not of opinion that privity of estate can result from entry into possession in the case of a person who has taken a transfer from the lessee of an interest which is not the whole interest in the term. The High Court were of opinion that the appellants were liable by reason of privity of contract and in support of this view cited *Dallas C. J.*, in (1819) 1 Br & B 238² at p. 263:

And, even as to privity of contract, there is such privity also, for the contract of the lessor is with the lessee and his assigns, and the defendants here are the assigns of the lessee: it is therefore a contract between the lessor and the assignee, that is, in this case, between the plaintiff and the defendants.

Before relying upon this dictum it would be necessary to enquire whether the principle which it expresses has been accepted in the law of England and how it consists with the doctrine, generally accepted, that the assignee's liability to the lessor can be brought to an end by his assigning the premises over to another. But in their Lordships' view the principle of the decision in 66 I A 50¹ is inconsistent with there being

1. ('39) 26 A I R 1939 P C 14: 179 I C 328: I L R (1939) 1 Cal 283: I L R (1939) Kar P O 78: 66 I A 50 (P O), *Ram Kinkar v. Satya Charan*.

2. (1819) 1 Br & B 238: 8 Moore 500: 21 W R 585, *Williams v. Bosanquet*.

privity of contract between the lessor and the mortgagee in respect of the rent and lessee's covenants. If the lessee retains part of his original interest in the term the mortgagee cannot be liable to the lessor for the whole of the rent and covenants; and cannot without apportionment be liable for any part thereof, whether or not he enters into possession. The transferee of a partial interest in the term cannot be taken to have promised the lessor to discharge any part of the burdens of the lessee. It would be somewhat remarkable if the lease in 66 I A 50¹ was not thought to be one in which "the contract is with the lessee and his assigns;" yet no suggestion is to be discovered to the effect that the mortgagees were liable by privity of contract. Their Lordships are of opinion that the principle of that decision is equally inconsistent with privity of contract as with privity of estate as a ground of claim against the mortgagee of leaseholds in such a case as the present. They will humbly advise His Majesty that this appeal be allowed, the decree of the High Court dated 18th February 1938, set aside and that of the subordinate Judge dated 6th December 1934, restored. Respondent 1 will pay the appellants' costs in the High Court and of this appeal.

G.N./R.K.

*Appeal allowed.*Solicitors for Appellant—*Hy. S. L. Polak & Co.*

Solicitors for Respondents—

Douglas Grant & Dold.

* A. I. R. 1941 Privy Council 38

(From Allahabad : A. I. R. 1936
All 301 F. B.)

4th December 1940

LORD ATKIN, LORD THANKERTON
AND SIR GEORGE RANKIN

Privy Council Appeal No. 64 of 1939; Allahabad
Appeal No. 37 of 1936.

*Maharani Hemanta Kumari Debi and
others — Appellants*

v.

*Gauri Shankar Tewari and others —
Respondents.*

* (a) Hindu law — Religious Endowment —
Bathing ghat at Benares — Dedication may be
complete or partial.

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math,

notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes. [P 41 C 1]

[On facts held that the proprietors have retained their rights of ownership notwithstanding that the ghats are public bathing places : 58 All 818 = A I R 1936 All 301 = 162 I C 512 (F B), *REVERSED*.]

* (b) Hindu law — Religious endowment —
Dedication — Complete and partial—Difference
explained.

In the usual case of complete dedication under Hindu law made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law, it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated. When the dedication is only partial the property in some parts of India might none the less in common parlance be described as devottar; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way, the only difference being that it passes with the charge upon it. [P 42 C 1]

(c) Customary right—Bathing ghat at Benares — Ordinarily right of user takes its origin by acts of user and not by dedication—Complete abandonment of owner's right is unusual even if river is of exceeding sanctity.

The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu; but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication : rather does it begin by acts of user which are acquiesced in by the owner of the pro-

perty who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing ghats: though it might be common enough in the case of tanks dedicated to the public for bathing purposes: even then the ownership of the banks would be another matter. The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. [P 42 C 1, 2; P 43 C 1]

C. S. Rewcastle and C. Sidney Smith —

for Appellants.

J. M. Parikh and P. V. Subba Row —

for Respondents.

Sir George Rankin. — The sanctity which Hindu thought and feeling attribute to the Ganges and the special veneration which its stream commands as it flows past the holy city of Benares (Kashi) are manifested by the temples and bathing ghats upon the banks. The efficacy of its waters to wash away every form of sin and pollution, is widely accepted doctrine among the orthodox and brings the Hindu pilgrim in large numbers seeking to acquire religious merit and advantage. According to evidence given in the present case

Mankarnika, Dasaswamedh, Panch Ganga, Assi and Barna are the panch tirthas of Kashi; one who comes to Kashi on pilgrimage has to visit all these five places.

In this appeal their Lordships are concerned with a bathing ghat which is known as the Prayag or Puthia ghat and which is covered by the name Dasaswamedh — the name of a mohalla of the city. The suit was brought on 15th February 1929 in the Court of the additional subordinate Judge of Benares. The plaintiff was Maharani Hemanta Kumari Debi, widow of the last male owner of the Puthiya Raj estate. She claimed to be owner of the ghat. She will be referred to as "the plaintiff" notwithstanding that pending this appeal she has by relinquishment accelerated the interest of her husband's reversioners who have been joined with her as appellants to His Majesty in Council. She impleaded six sets of defendants, 14 persons in all, alleging that they belonged to a class of Brahmins known as ghatias and that they and their predecessors, had been allowed by the owners of the ghat to sit on different portions of it in order to gain a livelihood by receiving alms and gifts from pilgrim bathers. She complained that the defendants were abusing the permission granted to them, by altering the condition of the steps, putting down platforms of earth and wood, erecting canopies and blocking up the free space to the detriment of the utility, cleanliness and beauty of the ghat. She alleged

that the defendants were mere squatters; that she had been willing to allow them to continue to sit on the ghat if they would execute written agreements for the proper conduct of the ghat; but that they had failed or refused so to do. She asked for relief in different forms — a declaration that she was the owner of the ghat and that the defendants had no right to sit on any portion of it; an order of ejectment of the defendants; an order for removal of the various obstructions put up by the defendants; and an injunction restraining the defendants from using any portion of the said Prayag ghat as ghatias in any season of the year and from sitting and squatting over the same for the purposes of collecting dan dakshina from the bathers.

A number of written statements were filed. The defendants numbered 2, 8 and 11 pleaded that they were mere servants of other defendants. The main defence as pleaded on behalf of the rest denied the plaintiff's proprietary right and set up that the ghatias were a community whose business and duty it was to assist bathers; that a ghat necessarily involved a right on the part of some members of this community to occupy portions of it by the use of seats or platforms of the kind known as chaukis or takhts; that this right was a form of property heritable and transferable by the Hindu law; that the defendants and their ancestors had been in occupation of definite sites on the ghat for hundreds of years; and that they had been guilty of no impropriety. They maintained that a right to occupy sites on the ghat by laying out chaukis and takhts had become vested in them by lost grant, prescription or custom.

The learned trial Judge heard more than 20 witnesses and by his judgment (25th June 1930) came to the conclusion that the plaintiff's ownership of the ghat was proved and that she had a right to sue as owner notwithstanding that the ghat was dedicated to the use of the public for purposes of bathing. He found that the ghatias do not belong to any particular class or community but are called ghatias because they sit on the ghats. He thought that there was nothing in any Shastra to show that their presence at the ghat is indispensable for the performance of religious ceremonies or that a bath in the Ganges would not yield any spiritual benefit unless accompanied by gifts to them. He found that in the case of the plaintiff's ghat and neighbouring ghats the ghatias had sat by leave and licence of the owners. He negatived the existence of any custo-

mary right in the defendants and found that at no time had any grant of any interest in the ghat been made to them. He further held that they could have no claim by prescription to an exclusive right to occupy any specific portion of a bathing ghat dedicated to the use of the public. In the result, he found for the plaintiff, but following a practice which is not to be commended he contended himself with ordering "that the plaintiff's suit as prayed be decreed" without formally stating the terms of the various orders, declarations and injunctions which he was granting, save by this reference to prayers in the plaint which might well have been improved by revision. An appeal to the High Court was taken by a number of the defendants. On 27th March 1935 it came before a Division Bench who in referring it to a Full Bench recorded an order mentioning that before them it was not in dispute that the plaintiff was the owner of the ghat or that the defendants or their predecessors had sat on different portions of the ghat for generations; also that the defendants did not claim any right by virtue of adverse possession but that they did claim a right of property in the ghat in respect of their long use of it for the purpose of assisting the bathers. A single judgment was given by the Full Bench (Sulaiman C. J., Bajpai and Ganga Nath JJ.) on 3rd January 1936. The learned Judges maintained the decree of the trial Judge in so far as it directed removal of railings, planks, canopies and other articles of obstruction but discharged the trial Judge's order of ejectment and the injunction granted by him to restrain the defendants from using the ghat as ghatias or sitting or squatting over the same. They discharged also the declaration made by the trial Judge that the plaintiff was owner of the ghat. The plaintiff upon this appeal complains of these variations and asks that the decree of the trial Judge be restored.

In the view of the learned Judges of the Full Bench the right claimed by the defendants may be divided into two parts: (1) a right to exclusive possession over specific plots of land and to place platforms and canopies over them; (2) the right to minister to the needs of the bathing public and to receive alms and gifts for their services. As regards the first the Full Bench found some difficulty in appreciating the nature of the right claimed but they found that ghatias as members of a class have no customary right and that the individual defendants could

have no right by custom to exclusive possession of any parts of the ghat. The claim to such a right by prescription or lost grant was also held to be bad. The Full Bench considered it to be proved that the takhts and canopies had been obstructions leaving little space for passage, injurious to the pavement and dangerous to the public using the ghat. In their Lordships' view, the reasons given by the learned Judges in their judgment fully justify their order for removal of the obstructions, and their rejection of the defendants' claim to have acquired any rights in this ghat whether by custom, prescription or grant. The defendants have not appealed from the High Court's decree.

But the Full Bench set aside the trial Judge's decree of ejectment and the injunction granted by him on the ground that such relief would interfere with the right of "the bathing public" to take to the ghat persons who may help in the proper performance of "spiritual ablutions" and ceremonies. It would be inconvenient, in a suit not constituted for the purpose, that an attempt should be made to define with exactness the extent of the user which the public have as of right in this ghat. But if it be assumed that any bather may bring with him his own priest or his own friend to assist in ceremonial ablutions, this is not in their Lordships' view a valid reason for refusing to the plaintiff an order in ejectment together with a properly framed injunction. The defendants have been sitting on the ghat for the purpose of carrying on their occupation there and have claimed to be entitled to exclusive possession of parts of the ghat as a right of property. If the plaintiff's ownership and possession entitle her to relief, then, upon it appearing that the defendants have no such rights as they claim, she is as well entitled to an order that the defendants should remove themselves as to an order for removal of their canopies. They are not persons who come with bathers to the ghat but persons who cumber the ghat in order to intercept the bathers and who do so continuously, habitually and as an occupation or profession. A right to stand, sit or squat on the ghat for the purposes of exercising the profession of ghatias may be acquired by consent of the plaintiff but as matters stand it is not the right of any of the defendants. As the rights claimed by the defendants have not been established, it is not clear that they have anything to gain by disputing whether the plaintiff is owner of the ghat or is merely the heredi-

tary superintendent of a religious endowment. In either case, she would be entitled to maintain a suit in respect of the grievances complained of, and to obtain the same or similar relief. But as the plaintiff sued as owner and as the Full Bench appear to have held that she was a mere manager or mutwalli it is right to consider whether the trial Judge's declaration of the plaintiff's ownership was well founded.

A bathing ghat on the banks of the Ganges at Benares is a subject-matter to be considered upon the principles of the Hindu law. If dedicated to such a purpose, land or other property would be dedicated to an object both religious and of public utility, just as much as is a dharamsala or a math, notwithstanding that it be not dedicated to any particular deity. But it cannot from this consideration be at once concluded that in any particular case there has been a dedication in the full sense of the Hindu law which involves the complete cessation of ownership on the part of the founder and the vesting of the property in the religious institution or object. There may or may not be some presumption arising in respect of this from particular circumstances of a given case, but, in the absence of a formal and express endowment evidenced by deed or declaration, the character of the dedication can only be determined on the basis of the history of the institution and the conduct of the founder and his heirs. That the dedication of property to religious or charitable uses may be complete or partial is as true under the Benares as under the Bengal School of Hindu law. Partial dedication may take place not only where a mere charge is created in favour of an idol or other religious object but also, as Mr. Mayne in his well known work was careful to notice where the owner retained the property in himself but granted the community or part of the community an easement over it for certain specified purposes (Hindu Law and Usage, 6th Edn., 1900, S. 438, page 567).

In 9 Cal 75,¹ the plaintiff's ancestor had built a temple and bathing ghat, as well as a room and another ghat for use by persons at the point of death. The defendant having used the ghat for the landing of goods, Field J. observed:

There is here no deed of endowment and no evidence has been taken as to the exact purpose and object of this so-called endowment. The first question which suggests itself is whether the plaintiff's father in building these temples, this antorjoli room and this ghat intended to give to the Hindu

community a right of easement over the soil, or intended to transfer the ownership of the buildings as well as the ownership of the soil to such community. It by no means necessarily follows that, because the plaintiff's father erected this ghat and this antorjoli room, and allowed the Hindu community to use them for the purposes set out in the plaint, he intended to divest himself of the ownership of the soil, etc.

The judgment of the Full Bench in the present case is open to criticism in respect that it does not take due account of this distinction. Speaking of the tolls collected from shopkeepers on the ghat at festivals, the learned Judges, though noticing that no trustee or manager had ever been appointed and that the plaintiff and her predecessors had bought the land, built the masonry steps and had always looked after and repaired the ghat, say:

The ghat having been dedicated to the public, it is not conceivable that the plaintiff or her predecessors could have ever wished to appropriate its income to their private use, nor has the plaintiff made any attempt to show that its income was ever appropriated by her or her predecessors. It therefore appears that the plaintiff and her predecessors realized the income of the ghat and made repairs as a manager or mutwalli and not as absolute proprietor. . . . The plaintiff is not entitled to a declaration of an absolute proprietary title in the ghat, as the same has been dedicated to the public, and the plaintiff has only the right of reversion if ever the ghat ceases to be used as such.

Another passage deals with the right of the defendants as follows:

The ghat having been dedicated to the public the defendants could not have acquired any right under any grant or prescription which might interfere with or limit the right of the public. As already stated, there is no difference in principle between the dedication of a ghat to the public and the dedication of a high road.

Now there is the very broadest distinction between saying that the plaintiff's ownership is not absolute because it is qualified by the public's right of user for purposes of bathing and saying that the plaintiff is not the owner at all, but a mere mutwalli in whom nothing vests because her predecessor had dedicated the ghat in the full sense of divesting himself completely of all interest therein. When in English law the owner of land is said to have dedicated it for a highway it is not intended or implied that his right of ownership has been divested. On the contrary, if any member of the public exceeds the permitted user a right of action in trespass arises to the dedicator or his successor in title by virtue of his ownership and possession: (1871) 7 Q B 47;²

1. ('88) 9 Cal 75 : 11 C L J 502, Jaggamoni Dasi v. Nilmoni Ghosal.

1941 K/6a

2. ('71) 7 Q B 47 : 41 L J M C 72 : 25 L T 800 : 20 W R 249, St. Mary Newington v. Jacobs.

(1893) 1 Q B 142.³ Dedication in the full sense known to the Hindu law is a different matter. In the usual case of complete dedication made to an idol, for example, the property ceases altogether to belong to the donor and becomes vested in the idol as a juristic person. Complete relinquishment by the owner of his proprietary right is however by no means the only form of dedication known to the Hindu law and is very different from anything that could ordinarily be inferred from the public user of a highway. From the standpoint of the Hindu law

it is not essential to a valid dedication that the legal title should pass from the owner nor is it inconsistent with an effectual dedication that the owner should continue to make any and all uses of the land which do not interfere with the uses for which it is dedicated : 4 C L J 343⁴ (per Mookerjee J. at p. 348).

When the dedication is only partial, the property in some parts of India might none the less in common parlance be described as devottar; but whether it be charged with a sum of money for the worship of an idol or be subjected to a right of limited user on the part of the public, it would descend and be alienable in the ordinary way; "the only difference being," as Mr. Mayne observes in the passage already referred to in this judgment "that it passes with the charge upon it." (Hindu Law and Usage, Ed. 6th, 1900, S. 438, p. 567).

The conclusion of the Full Bench that the plaintiff had only the right of reversion if ever the ghat ceases to be used as such appears to have been drawn from the mere fact that the ghat was "dedicated to the public." But a review of the history of the ghat and the conduct of the plaintiff and her predecessors is required to determine whether the river bank at this spot was dedicated in such sense as to make an end of private ownership therein. The written statements of the defendants set up that the land on the bank of the holy river Ganges between the two confluents of Baruna and Assi rivulets in the city of Benares is waqf property from time immemorial the same having been dedicated to the Hindu community at large.

The exceeding sanctity of the river is not of itself a reason why a pious benefactor of the public should do more than provide access to its waters. Whether the question be limited to the ghat in suit or be enlarged by consideration of the evidence about

3. ('93) 1 Q B 142 : 62 L J Q B 117 : 4 R 155 : 68 L T 35 : 41 W R 322, Harrison v. Rutland.

4. ('06) 33 Cal 1290 : 4 C L J 343 : 10 C W N 1044, Chairman of the Howrah Municipality v. Khetra Krishna Mitter.

neighbouring ghats, it seems to their Lordships that there is no substantial ground for holding that the plaintiff's predecessors or any of them had divested themselves of all property in this ghat and had accepted the position of having a mere right of management. No express dedication has been proved by production of a deed of endowment or otherwise. No manager has ever been appointed. Not one instance has been shown in which the plaintiff or any predecessor has purported to act as superintendent, sebit or mutwalli. On the contrary, they have been treated as owners whenever by disrepair the ghat has attracted the attention of public authority. They have repaired and substantially improved the ghat at their own expense. They have closed it to bathers on proper occasions and have levied tolls on the keepers of shops at festivals. That their expenditure upon the ghat has exceeded their receipts and that they would not wish to make a profit from the tolls is probable enough but in no way tends to prove that they have parted with all right as owners of the soil. The evidence as to agreements taken from ghatias upon nearby ghats is strong to show that in them the proprietors have retained their rights of ownership notwithstanding that the ghats are public bathing places. The learned trial Judge very reasonably thought that the evidence was overwhelming to show the plaintiff's proprietary right and their Lordships though bearing well in mind that there was a bathing ghat at this spot before the purchase of the plaintiff's predecessor in 1814, think that there is little to support a contrary view. The river bank at Benares is a sacred and historic spot with a powerful claim to the regard of a pious Hindu: but the practice of bathing in the Ganges is not in general so directly connected with the worship of a particular deity that nothing short of complete dedication would be appropriate for a public bathing ghat. The character of the use to be made of the bank does not require it. Nor does the public right of use for purposes of bathing take its origin as a rule from an immediate and express act of dedication : rather does it begin by acts of user which are acquiesced in by the owner of the property who in due course makes provision for the public needs as an act of charity or piety. It may well be doubted whether a complete abandonment of the owner's rights is at all usual in the case of public bathing ghats : though it might be

common enough in the case of tanks dedicated to the public for bathing purposes: even then the ownership of the banks would be another matter.

Their Lordships are of opinion that the declaration made by the trial Judge as to the plaintiff's ownership as well as his order of ejectment against the defendants was correct. They think that the terms of the permanent injunction to be granted to the plaintiff should restrain the defendants from frequenting the Prayag ghat, without the consent of the plaintiff or her successor in title, for the purpose of acting as ghatias thereon, and from sitting or squatting upon the same without such consent in the exercise of the profession or occupation of ghatias. They will humbly advise His Majesty that this appeal should be allowed that the decree of the High Court dated 3rd January 1936, be set aside and that the decree of the additional subordinate Judge of Benares dated 25th June 1930, be restored with the variation mentioned as to the terms of the permanent injunction. The respondents will pay the costs of the plaintiff in the High Court and of the appellants in this appeal. The appellants must, however, pay to the respondents the costs of the application to restore the appeal, which had been dismissed for non-prosecution, as directed by the order in council of 25th July 1939, and there must be a set-off as regards these costs.

K.S./R.K.

Appeal allowed.

Solicitors for Appellants—*Douglas Grant & Dold.*

Solicitors for Respondents—*Harold Shephard.*

(28) A. I. R. 1941 Privy Council 43

(*From Madras : A. I. R. 1937 Mad 816*)

2nd December 1940

LORD ATKIN, LORD THANKERTON
AND SIR GEORGE RANKIN

Ramanathan Chettiar — Appellant

v.

M. Ar. Rm. Viswanathan Chettiar — Respondent.

Privy Council Appeal No. 60 of 1938.

(a) Hindu law — Alienation — Manager — Necessity—Manager of joint trading family incurring debt to pay off trade debts — Lender must show either necessity for loan or reasonable enquiry for necessity of loan, and facts if true would have justified loan : (1937) 2 M L J 559 = A I R 1937 Mad 816 = 176 I C 1003, *REVERSED*.

Where the manager of a joint trading family incurs debts for paying off trade debts the lender must either show that there was necessity for the loan, or that he made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan : (1937) 2 M L J 559 = A I R 1937 Mad 816 = 176 I C 1003, *REVERSED*. [P 44 C 1]

(b) Evidence Act (1872), S. 114—Joint family trade—Manager for himself and on behalf of his minor brother executing mortgage to pay off trade debts—Suit to enforce mortgage—Manager and his brother summoned to produce account books—Both filing affidavits that account books were not with them nor did they know in whose possession they were—Evidence acquiesced in by plaintiff and no further steps taken — No adverse inference held could be drawn by non-production of account books : (1937) 2 M L J 559 = A I R 1937 Mad 816 = 176 I C 1003, *REVERSED*.

The manager of a joint trading family executed a mortgage for himself and on behalf of his minor brother to pay off trade debts. The mortgagee brought a suit to enforce his mortgage. On being summoned to produce their account books in answer to the order for discovery, the younger brother filed an affidavit to the effect that the documents were not, and never had been in his possession or under his control. The manager also filed an affidavit to the effect that the accounts had been given to two Panchayatdars, both of whom were dead, and that he did not know in whose possession the documents were. The Court then made the following entry on the order sheet, "Petition by plaintiff to direct defendants 1 and 2 to discover on oath. Statements filed may be taken to be sufficient. Petition closed." No further steps were taken by the plaintiff in the matter :

Held that the evidence acquiesced in by the plaintiff negated any deliberate withholding of account books on the part of either defendant and no adverse inference could be drawn from the non-production of the account books : (1937) 2 M L J 559 = A I R 1937 Mad 816 = 176 I C 1003, *REVERSED*. [P 44 C 2]

J. P. Eddy and J. M. Parikh — for Appellant.
P. V. Subba Row — for Respondent.

Lord Thankerton.—The appellant, who is defendant 2 in a suit brought by the respondent to enforce a mortgage, appeals from a decree of the High Court of Judicature at Madras dated 20th April 1937, which modified a decree of the subordinate Judge of Devakottai dated 31st July 1930. The mortgage in suit was executed on 22nd December 1916, in favour of Ekappa Chettiar by Annamalai Chettiar, who is defendant 1 in the present suit, "for himself and as family manager and guardian of his undivided younger brother Ramanathan," the present appellant, for the sum of Rs. 5000, on the security of certain properties belonging to the joint undivided family. The consideration was stated to have been received "by your obtaining the same and paying the same towards the debts due by our common firm at Colombo."

Chokalingham Chettiar, who had three daughters by his first wife, but no son, adopted defendant 1 as his son. After the death of his first wife, he married a second wife, by whom he had a son, the appellant. Chokalingham, who died in the early part of 1910 or sooner, carried on a business in Colombo. The appellant and defendant 1 are members of an undivided Hindu family, governed by the Mitakshara law. In 1916 defendant 1 was karta of the family, the appellant being then a minor. On 3rd January 1924, the respondent acquired for Rs. 5000 the interest of Ekappa Chettiar in the mortgage, and he brought the present suit to enforce the mortgage on 14th March 1927.

The only question in the appeal is whether the mortgage of 1916 is binding on the interest of the appellant in the property mortgaged. There can be no doubt that, in accordance with the principles established by this Board, the respondent, as plaintiff in the suit, is required either to show that there was necessity for the loan, or that the mortgagee made reasonable enquiry as to the necessity for the loan and that the facts represented to him were such as, if true, would have justified the loan. The reason for the loan, as alleged in the mortgage in suit, was the discharge pro tanto of debts due by the family business in Colombo. This involves two questions of fact, namely the continued existence of the family business in Colombo in 1916, and the indebtedness of such business.

In the opinion of their Lordships there is no evidence sufficient to establish — even *prima facie* — these facts, and there is no evidence of any enquiry made by the mortgagee, Ekappa Chettiar, as to the truth of the representations made to him by the mortgagor, defendant 1. The statements of the latter in his written statement, which were not supported in evidence, are of no value as against the appellant. The respondent relied on three documents, Exs. G, H and J, all dated 30th July 1910, but these are of little or no relevance; they are, if anything, more suggestive of the Colombo business having been wound up in 1910, than of its continuation as a going business after Chokalingham's death. There is literally no evidence as to the position in 1916, and their Lordships find themselves unable to agree with the construction that the High Court have placed on the written statement of the appellant. Their Lordships are unable to read the appellant's pleading as otherwise than a complete denial of both the conti-

nuance of the Colombo business and of the existence of debts of such business in 1916. Nor are their Lordships able to agree with the criticisms of the learned Judges as to the non-production of the business books. In answer to the order for discovery, the appellant filed an affidavit on 16th November 1927, to the effect that these documents were not, and never had been, in his possession, or under his control. On 23rd November 1927, defendant 1 filed an affidavit to the effect that the accounts had been given to the two Panchayatdars, both of whom were dead, and that he did not know in whose possession the documents were. On 5th December 1927, the following entry appears on the order sheet:

Petition by plaintiff to direct defendants 1 and 2 to discover on oath. Statements filed may be taken to be sufficient. Petition closed.

The respondent appears to have taken no further steps in the matter. The learned Judges of the High Court held that the defendants had deliberately withheld this evidence from the Court, which was peculiarly within their knowledge, and that the inference was irresistible that had it been produced, it would have been fatal to their case. Their Lordships agree with the view of the subordinate Judge. The evidence, acquiesced in by the respondent, negatives any deliberate withholding on the part of either defendant; there is no reason why the appellant should have ever had the documents, or have known what they contained, and there is no ground for any adverse inference. There seems little doubt that, if they had not been affected by this point and the construction that they placed upon the written statement of the appellant, the learned Judges would have agreed, as their Lordships do, with the subordinate Judge's dismissal of the suit as against the appellant. Their Lordships will therefore humbly advise His Majesty that the appeal should be allowed, that the decree of the High Court so far as it relates to the appellant, should be set aside, and that the respondent should pay the appellant's costs of this appeal and in the High Court.

G.N./R.K.

Appeal allowed.

Solicitors for Appellant — *Lambert & White.*

Solicitors for Respondent — *Harold Shephard.*

* (28) A. I. R. 1941 Privy Council 45

(From Patna : A. I. R. 1936 Pat 616.)

3rd April 1941

LORDS ATKIN, THANKERTON
AND ROMER, SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON

Jagat Narayan Singh — Appellant

v.

Khartar Sah and another —

Respondents.

Privy Council Appeal No. 53 of 1939.

* Civil P. C. (1908), O. 21, Rr. 58 and 90 —
Third party objecting to sale of his property for
debt of another — He must proceed under R. 58
and not apply under R. 90 after sale.

A third party objecting to the sale of his property
for the judgment-debt of another person cannot
disregard R. 58 of O. 21, and apply after the sale
under R. 90 of that order, treating the case as one
of irregularity in publishing or conducting the sale.
[P 46 C 2]

C. Sidney Smith — for Appellant.

Respondents Ex parte.

Sir George Rankin. — The appellant is the legal representative of one Madhusudan Singh, deceased. The appeal, which is brought in forma pauperis, arises out of proceedings to enforce a money decree dated 23rd March 1926, obtained against Madhusudan's brother Shyam Lal by one Soshi Bhusan in the Court of the Subordinate Judge at Jamtara in the Sontal Parganas. The execution case which has given rise to this appeal was brought in the same Court on 15th September 1930, by respondents 1 and 2 who had in 1929 purchased the rights of Soshi Bhusan in the decree. It is numbered Money Execution Case No. 14 of 1930. It was the second case brought to enforce the judgment of 1926, the first (Money Execution Case No. 12 of 1928) having been brought in the same Court by the original decree-holder Soshi Bhusan on 22nd May 1928. The main question raised before the Board is as to the effect to be given in the second case to certain orders passed against Madhusudan in the first. Shyam Lal was the owner of an impartible estate known as the Jamtara estate and being involved in debt, he assigned his immovables to Madhusudan by deed dated 10th January 1928, reserving only a maintenance allowance to himself. The deed recited Shyam Lal's indebtedness and that he was ill and made it clear enough that the purpose of the assignment was to enable the debts to be paid off by proper management of the estate. Shyam Lal having failed to give Madhusudan possession according to the deed, Madhusudan in 1924 sued Shyam

Lal in the Court of the Subordinate Judge at Asansol to enforce the deed. This suit was compromised in 1927. By the compromise decree dated 17th March 1927, Madhusudan was declared to be the owner of the estate and a receiver was appointed to manage it, Shyam Lal being declared entitled to a monthly maintenance allowance. Madhusudan got himself recorded as proprietor. A considerable fortification was thus erected against any attack by Shyam Lal's creditors upon the Jamtara properties. Though the exact position of Madhusudan in relation to his brother is not quite clear their Lordships will not assume that he was a mere agent, trustee or benamidar.

When the first execution application was made on 22nd March 1928, the names of Madhusudan and the receiver were added thereto as "judgment-debtors", though it does not appear from anything on the record submitted to the Board that Soshi Bhusan had at any time obtained judgment against Madhusudan. Certain portions of the Jamtara estate having been attached in execution Madhusudan on 18th September 1928, applied under R. 58 of O. 21 of the Code that they be released from attachment. Not content, however, with this step he followed it up on 8th October 1928, with an application to the like effect made under S. 47 of the Code. In both proceedings his objections were that he was not a party to the decree and that there was no charge upon the Jamtara estate for the decretal debt of Shyam Lal. The learned Subordinate Judge having correctly observed that the two applications were inconsistent — the first being upon the footing that Madhusudan was a stranger to the suit in which the decree had been passed and the second on the footing that he was a "representative" of the judgment-debtor — dismissed both of them. By his order dated 29th November 1928, he held that Madhusudan was a "representative" of Shyam Lal within the meaning of S. 47 of the Code and that by virtue of S. 146 the decree could be executed against him and against the receiver as representing him. The terms of S. 146 are as follows:

Save as otherwise provided by this Code or by any law for the time being in force where any proceeding may be taken or application made by or against any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Whether as a result of this decision or in anticipation of it or independently of it, a compromise petition was on the same day

(29th November 1928) filed in Court with the result that on the next day (30th November) the sale which had been fixed for that day was not held. Madhusudan was a party to the compromise as one of "the judgment-debtors". The terms of compromise were that Soshi Bhusan received Rs. 3000 in cash and agreed to take the balance in annual instalments of Rs. 1393.12.3. There was a further provision :

If any third person as decree-holder executes his decree, then this decree-holder will be competent to execute his decree without waiting for payment of instalment and will be able to arrange for realization of the entire amount due from the estate. To that the judgment-debtors will not have the right to raise any objection.

On 30th November an order on this petition was made: "Case struck out partly satisfied on the joint petition of the decree-holder and the three judgment-debtors". The attachment of the Jamtara estate properties thus came to an end. The balance of the debt was not paid as agreed and respondents 1 and 2, having bought the decree, applied for execution on 15th September 1930. Madhusudan and the receiver were again cited as judgment-debtors in addition to Shyam Lal. Properties of the Jamtara estate were again attached and were sold on 6th June 1931. Madhusudan took no steps in the meanwhile, but on 6th July 1931, he applied to have the sale set aside under R. 90 of O. 21 of the Code which provides that at the instance of any person whose interests are affected by the sale such an order may be made "on the ground of a material irregularity or fraud in publishing or conducting" the sale. He set out in his application eleven grounds of which the first nine alleged various irregularities as to notice and otherwise in connexion with the sale. As his tenth and eleventh grounds he said that the sale was without jurisdiction and was in any view of the case liable to be set aside. After hearing a number of witnesses, the learned Subordinate Judge by his order of 12th November 1932, held that Madhusudan's case failed on the facts as regards all the irregularities alleged and this finding is not now disputed. He further held, however, that the sale should be set aside on the question of jurisdiction. He rejected the view that Madhusudan was the "representative" of Shyam Lal, and he did not consider that the compromise which had ended the previous execution case could be enforced in execution against Madhusudan without any decree against him having been obtained.

The High Court at Patna by the order of 14th April 1936, which is now under appeal have reversed this decision. The learned Judges (Wort Ag. C. J. and Dhavle J.) do not appear to have proceeded upon the ground that a third party objecting to the sale of his property for the judgment-debt of another person cannot disregard R. 58 of O. 21 and apply after the sale under R. 90 of that Order treating the case as one of irregularity in publishing or conducting the sale. They held that in the previous case the Subordinate Judge had decided that Madhusudan was the representative of the judgment-debtor, and though one if not both of the learned Judges considered his decision to be wrong, they held that the case before them was concluded by that decision on the principle of *res judicata*.

Their Lordships have not had the advantage of hearing any argument on the part of the respondents to this appeal, no appearance having been made on their behalf. They are somewhat unwilling in the circumstances to go beyond what is required for the proper disposal of the appeal in discussing the technical details of procedure in execution. It appears to them, however, that Madhusudan on his own case ought in the later execution proceeding as in the earlier to have made a claim under R. 58 of O. 21 if he desired to take up the attitude of a third party whose property was being wrongfully taken for another's debt. To treat this objection to the sale as a matter of irregularity in publishing or conducting the sale was not open to him, and the application under Rule 90 was altogether misconceived. The only way in which any order in his favour could have been rendered competent, assuming his own case to be well founded, was by treating his application as one under R. 58. While their Lordships appreciate the force of the observation made by Dhavle J., with reference to the first execution case, that "too much importance ought not to be attached to the particular labels attached to his applications," they cannot think it right to hold that the Court should have allowed any such indulgence to Madhusudan having regard in particular to the compromise petition whereby he plainly undertook that the decretal sum should be paid and that the properties now in question should be answerable for it in his hands. It is not clear that on 6th July 1931, a month after the sale, an application under Rule 58 would have been in time. Different opinions appear to have been expressed by High Courts

in India upon the question. He had, moreover, called a number of witnesses as to the publication and conduct of the sale—an inquiry which was futile on the footing that the property was not liable to be sold. He does not appear to have made any application to the High Court for leave to make a case under Rule 58. But whether or not by taking appropriate steps he could have succeeded in defeating the promises made by him in the compromise petition, he was not, in their Lordships' opinion, entitled to the assistance of the Court in that behalf, and the order of the High Court confirming the sale must be maintained.

Their Lordships are not to be taken as accepting the view that Madhusudan was a "representative" of the judgment-debtor, or indeed that any person bringing under R. 53 a claim to attached property as property to which he is entitled as against the judgment-debtor can be refused the benefit of the procedure laid down for investigation of claims or the right to question the summary decision by a suit. Nor do their Lordships profess to have ascertained what bearing S. 146 of the Code has upon such a case as the present or how it comes to be considered that the property of a "representative" of a living person against whom a money decree has been passed is answerable for the decretal debt. Further, assuming that Madhusudan in the first execution case was wrongly held to be his brother's "representative" within the meaning of S. 47, their Lordships see difficulty in the view that such a decision on a question of procedure gave the decree-holder a vested right to the misapplication of the Code in all future execution cases between the parties in respect of the same decree. Upon these and other matters their Lordships would have desired to hear argument for the respondents and they make every reserve as to the correctness of the views expressed in the Indian Courts upon these questions and other questions involved therewith. They will humbly advise His Majesty that this appeal should be dismissed.

K.S./R.K.

*Appeal dismissed.*Solicitors for Appellant—*Hy. S. L. Polak & Co.*
Respondents *Ex parte*.* (28) A. I. R. 1941 Privy Council 47
(*From Rangoon*)

3rd April 1941

LORDS ATKIN, THANKERTON
AND ROMER, SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON*M. M. R. M. Chettiar Firm —**Appellant*

v.

S. R. M. S. L. Chettiar Firm and others
— Respondents.

Privy Council Appeal No. 9 of 1940.

* Transfer of Property Act (1882, before amendment in 1929), S. 55 (6) (b)—Contract of sale cancelled and purchaser allowed to remain in possession till repayment of purchase price paid by him — Suit by subsequent transferee from seller for possession — Purchaser under cancelled sale alleging novation but not proving it—No question of statutory charge under S. 55 (6) (b) raised in trial Court — Appellate Court held could not entertain such question as it involved issues of fact neither raised nor considered—*B's* possession held did not amount to sufficient notice under S. 55 (6) (b).

B, who had entered into a contract to purchase certain property from *A*, cancelled the contract but was allowed to remain in possession of the property until the purchase price which he had paid was repaid to him. In a suit for possession by *C*, who had purchased the property subsequently from *A*, *B* pleaded the novation of the contract under which he was allowed to remain in possession till payment but failed to prove the novation. Except this contractual charge, no question of statutory charge under S. 55 (6) (b) was raised in the pleadings and no issue was framed thereon :

Held that it was not open to the High Court in appeal to entertain this question of statutory charge under S. 55 (6) (b) as it involved the issues of fact which had not been raised or considered, viz., (1) whether *B* had improperly declined to accept delivery and (2) whether *C* had notice of payment by *B* to *A*,
[P 48 C 2]

Held further that *B's* possession was not sufficient notice within the meaning of S. 55 (6) (b) as possession by a tenant is not notice of the lessor's title, unless the transferee had in fact learnt that the rents were paid to him.
[P 48 C 2]

J. M. Parikh and P. V. Subba Row —

for Appellant.

A. Pennell — for Respondents.

Lord Thankerton. — This is an appeal from a decree of the High Court of Judicature at Rangoon, dated 8th March 1938, which varied a decree of the District Court at Thaton, dated 27th September 1937. By a registered sale deed dated 4th December 1928, the appellant firm purchased from the first respondent firm certain lands, of which respondents 2 and 3 are in possession, and in the present suit the appellant firm sues for possession. The only question in the appeal is whether respondents 2 and 3 have a charge upon the lands which is valid as

against the appellant firm. On this point the only case made by respondents 2 and 3 in their pleadings and the only case that was tried by the District Judge was as follows:—that they agreed in March and April 1924, to buy the lands in suit from respondent 1 but that they found that the land in Kyagale Kwin was inferior to the lands in Ngotto Twin, and that, on their protest and after negotiation, it was agreed between them and respondent 1 on 30th May 1924, that the sale contract should be cancelled, and that they should remain in possession of the lands until repayment of the sum of Rs. 16100 already paid by them towards the purchase price payable under the cancelled contracts, and that they should have a charge on the lands for that amount. The issues relative to this point were :

(1) Was there a novation of contract as alleged in para. (6), cl. (e) of the written statement of defendants 2 and 3 ? (2) Did defendants 2 and 3 take possession of the suit lands as a result of such novation of contract?

There was thus no suggestion of anything but a contractual charge in the pleadings or at the trial, and by his judgment dated 27th September 1937, the learned District Judge found that respondents 2 and 3 had failed to prove the alleged agreement of 30th May 1924. On their appeal to the High Court, it does not appear that this finding was seriously challenged, and a completely new contention was introduced, based on S. 55 (6) (b), T. P. Act, which was held by the learned Judges to apply to this case, and they varied the decree for possession made by the District Court, by making the grant of possession subject to payment to respondents 2 and 3 of the balance due to them in respect of the purchase price partly paid by them, after taking into account the mesne profits of the lands. Their Lordships find themselves unable to hold that the High Court were justified in giving effect to this new contention, and, in their Lordships' opinion, the learned Chief Justice did not do justice to the learned District Judge when he said

that neither the facts nor the principles of law were ever properly presented to the mind of the learned District Judge, who had to decide a very simple issue and allowed the matter to be complicated by elaborate references to what he described as a novation.

The only case submitted to the District Judge was a simple one and it was not inaccurately described as a case of novation, viz., the cancellation of the original contracts of sale and the substitution of the new agreement of 30th May 1924, in their place.

In the opinion of their Lordships, the learned Judges of the High Court were not justified on the failure of this simple issue, in entertaining the question of a statutory charge, as, owing to its absence from the pleadings and the issues, two important issues of fact, which were essential to its success, had not been considered. These two questions are (a) whether the buyer has improperly declined to accept delivery of the property, and (b) whether the appellant firm, as a transferee from the seller prior to the Amending Act of 1929 had "notice of the payment;" these words were taken out in 1929. It cannot be suggested that the evidence, which was directed to the somewhat inconsistent case of cancellation of the sale contracts and a new agreement, contains the material on which, with any justice, these two matters can be determined, and the view of Dunkley J. that the possession of respondents 2 and 3 was sufficient notice, seems to forget that possession by a tenant is not notice of the lessor's title, unless the transferee had in fact learnt that the rents were paid to him, and the evidence, so far as it goes, suggests that the lands in suit were occupied by tenants without disclosing whether any rent was in fact paid to respondents 2 and 3 or whether, if so, the appellant was aware of it.

In these circumstances, their Lordships are of opinion that the decree of the High Court cannot stand, and that the decree of the District Judge should be restored, and they will humbly advise His Majesty accordingly. Respondents 2 and 3 must pay the appellant's costs of this appeal and his costs in the High Court.

K.S./R.K.

Appeal allowed.

Solicitors for Appellant—*Harold Shephard.*

Solicitors for Respondents—*Lambert & White.*

* (28) A. I. R. 1941 Privy Council 48
(From Madras : A I R 1937 Mad 461.)

18th March 1941

LORD THANKERTON, SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON

Merla Ramanna — Appellant

v.

Chelikani Jagannadha Rao and others
— Respondents.

Privy Council Appeal No. 11 of 1939.

(a) Deed—Construction — Sale deed — One coparcener purporting to transfer his interest in joint estate to other coparcener — Transaction held nominal in sense of not affecting right of parties inter se.

In the year 1900 K who was a coparcener with his brother D purported to transfer by a deed of sale his one-tenth interest in the joint estate to D. Of the total consideration of Rs. 12,500 only Rs. 650 were paid in cash to K the rest being accounted for in the deed by recitals about debts of the joint family, of the parties' own branch of the family and of K personally, and by a statement that Rs. 1000 had been paid as earnest money. Though accounts kept by D over many years were in evidence there was no satisfactory proof of the existence of the alleged debts of their father and none at all that they were in 1900 pressing or that payments were made by D in discharge of them. The accounts drew no distinction between properties sold to D and other properties in which K retained his original interest as a coparcener. He and his family were shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches of the family became divided in status. The transaction of sale could not be accounted for save upon the ground that K was thought to be foolish and extravagant and given to bad habits likely to lead to his dissipating his property. There was direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there was evidence of statements made by D disclaiming that by the sale deed he had become entitled to his brother's share:

Held that the oral evidence in the case must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts, and that the deed of sale was merely "nominal" in the sense that it was not intended to have effect upon the right of the parties inter se. [P 50 C 2]

* (b) Hindu law—Partition—Sham agreement of sale whereby one coparcener pretending to transfer his fractional share to other coparcener — Reference in agreement by coparceners to their interest as represented by fractional share cannot change their joint status contrary to their intention to remain joint and undivided.

The reference to their interests as represented by a fractional share by the coparceners in a deed embodying a sham agreement of sale whereby one of them purports to transfer his share to the other merely for the purpose of pretence cannot have the effect of changing the undivided status of the parties contrary to their intention to remain joint and undivided: 11 M I A 75 (P C), *Ref.* [P 51 O 1]

J. M. Parikh and R. A. Parikh—for Appellant.
Sir H. Cunliffe and P. V. Subba Row —
for Respondents.

Sir George Rankin. — Dharma Rao and Kasibabu were brothers, the former being older than the latter by about 19 years. The appellant Merla Ramanna was a creditor of Dharma Rao in respect of a promissory note executed in 1928 for Rs. 10,000 with certain interest. Respondents 1 and 2 (herein called the respondents) are the sons of Kasibabu who died in 1910. The family is governed by the Mitakshara. Respondents 3 and 4 do not appear and need not be mentioned. After Dharma Rao's death in 1929, the appellant sued the respondents in the Court of the Subordinate Judge at Coconada as being persons in possession of Dharma Rao's estate

1941 K/7 & 8

and on 27th January 1931 recovered judgment in the usual form limited to assets of Dharma Rao which had come to their hands. Certain immovables in which Dharma Rao had had an interest were attached before judgment and on 22nd April 1932, the respondents applied to the Subordinate Judge to raise the attachment contending that the properties attached were not liable to be taken in execution under the decree. Their case is that they were coparceners with their uncle in a joint Hindu family governed by the Mitakshara and that on Dharma Rao's death they became entitled by survivorship to the whole interest in the joint family property, the appellant, though a creditor of Dharma Rao, not having taken any steps in his debtor's lifetime to recover his debt.

The appellant, on the contrary contends that Dharma Rao and Kasibabu had ceased so far as regards the attached properties to be undivided and had become separate in estate by reason of a deed of sale (Ex. B) dated 22nd March 1900 whereby Kasibabu purported to sell his one-tenth interest therein to his brother Dharma Rao. To this the first answer of the respondents is that the deed was a sham deed not intended to have any effect upon the rights of the parties and not the expression of any agreement between them. Further, and in the alternative, the respondents contend that even if the deed of sale was intended to be operative and was entered into *animo contrahendi* it did not have the effect of dividing the brothers' interest in the attached properties or of bringing to an end the right of the survivor to succeed to the whole interest. This contention is based upon the circumstance that in 1900 other branches of the family were joint with the branch represented by Dharma Rao and Kasibabu and it is said that the members of these other branches are not shown to have had notice of the deed of sale. As their Lordships do not find it necessary to examine this contention it need not be stated more particularly. The respondents also contend that if Dharma Rao had acquired Kasibabu's one-tenth interest in addition to his own he had brought the income into the common stock so as to make the properties joint. This contention was raised by the respondents in their petition and though it does not seem to have been urged at the hearing before the Subordinate Judge, it was maintained before the High Court with success.

Apart from Ex. B, their Lordships are satisfied that there is no ground for main-

taining that Dharma Rao and Kasibabu's sons had become divided in respect of the properties now in question. The learned Subordinate Judge found that the respondents had "failed to prove that Ex. B is a sham or a nominal document" but the High Court on appeal thought that "the conclusion is irresistible that Ex. B, the sale deed, was a nominal conveyance." The learned Subordinate Judge found in favour of the appellant that Ex. B operated to divide the interests of the two brothers and by his order of 10th September 1934 he maintained the attachment. The High Court having found that Ex. B was not intended to be acted on held that it did not operate a division of status as between the brothers. They also held that this would not have resulted from the deed even if it had been a real and not a sham transaction; and that if a division of interest had taken place by virtue of the deed the manner in which the income had been treated by Dharma Rao restored the properties comprised therein to the condition of joint family property. The High Court by order dated 16th November 1936 accordingly held that the appellant was not entitled to have recourse to the attached properties in execution of his decree, and this is the decision now complained of.

There is a good deal of evidence upon the question whether the deed of sale (Ex. B) was intended by the parties thereto as an agreement between them or was executed merely to bring into existence a document which might, contrary to the truth, appear to have taken away from Kasibabu his interest in the properties comprised therein. Upon a full consideration of this evidence their Lordships are of opinion that the view taken by Mockett and Lakshmana Rao JJ. in the High Court has the greater reason and should prevail. In 1900 Kasibabu had just attained the age of 18 years and Dharma Rao was 37. Of a total alleged consideration of Rs. 12,500 only Rs. 650 is said to have been paid in cash to Kasibabu at the time the rest being accounted for in the deed by recitals about debts of the joint family of the parties' own branch of the family and of Kasibabu personally, and by a statement that Rs. 1000 had been paid as earnest money. Though accounts kept by Dharma Rao over many years are in evidence there is no satisfactory proof of the existence of the alleged debts of their father and none at all that these were in 1900 pressing or that payments were made by Dharma Rao in discharge of them. It is reasonably clear from these

accounts that they draw no distinction between properties sold to Dharma Rao by Ex. B and other properties in which Kasibabu retained his original interest as a coparcener. He and his family are shown to have been provided for out of the income of the family as a whole down to 1908 when the four branches became divided in status, and thereafter out of the income of the branch. It is not easy to account for such a transaction as the deed discloses, save upon the ground that Kasibabu was thought to be foolish and extravagant and given to bad habits, likely to lead to his dissipating his property. There is direct evidence contradicting one of the recitals as to his having taken a loan during his minority, and there is evidence of statements made by Dharma Rao disclaiming that by the deed he had become entitled to his brother's share. In 1912 at the making of the record of rights no such effect appears to have been given to the deed.

There was another deed in 1910 whereby Kasibabu purported to divest himself of other properties in favour of a nominee for Dharma Rao, and there is also to be considered the fact that Dharma Rao in 1927 made an ineffective, because unwitnessed, will purporting to leave all his properties to the respondents. In the present case, the oral evidence as to which the Courts in India have differed must be judged mainly upon the probabilities arising out of the proved documents and the admitted facts. Their Lordships think it sufficient to say that the careful and detailed examination of the evidence given by Lakshmana Rao J. in his judgment appears to them to be convincing and that they agree with the High Court in regarding the deed of sale as being merely "nominal" in the sense that it was not intended to have effect upon the right of the parties inter se.

Even so, and upon the footing that Ex. B is only a sham, and not a real transaction, the appellant has contended before the Board that it would in law divide the interest of the parties thereto so as to put an end to the *jus accrescendi* or right of survivorship between coparceners. The learned Judges of the High Court do not appear to have contemplated that a document which was not the expression of an agreement at all and not intended to have effect upon the rights of the parties could have the important effect of changing their undivided status. The repeated references in Ex. B to the one-tenth share of each of the two

brothers have been emphasised in argument for the appellant but, while they do not seek in any way to qualify what was said in 11 M I A 75,¹ their Lordships are unable to hold that coparceners who intend to remain joint and undivided become divided contrary to their intention because for purposes of pretence they refer to their interests as represented by a fractional share. Where a third party has been induced to act upon the footing of such a document as Ex. B, very different questions may arise by reason of estoppel or otherwise, but the question in the present case is limited to the parties themselves and to the immediate effect of the deed. Even a member of a Mitakshara family may sometimes be forgiven for speaking of his "one-third share" instead of using the more accurate but more elaborate expression "the share which if a partition were to take place to-day would be one third." But, in the present case, the reference to the shares as "one-tenth" share is part of the pretence of sale. When once the conclusion is reached that Ex. B is not the expression of any intention or agreement to transfer Kasibabu's interest to Dharma Rao, propriety or impropriety of language matters little since the deed does not warrant any inference of a previous or independent agreement to hold in divided shares. Their Lordships are of opinion that it is not shown as regards the properties now in question that Dharma Rao had before his death ceased to be joint with Kasibabu's sons. They will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs to respondents 1 and 2.

G.N./R.K.

*Appeal dismissed.*Solicitors for Appellant — *Lambert & White.*

Solicitors for Respondents —

Hy. S. L. Polak & Co.

1. ('66) 11 M I A 75 : 8 W R 1 : 1 Suther 657 : 2
 Bar 218 (PO), Appovier v. Ramasubba Aiyar.

(28) A. I. R. 1941 Privy Council 51

(From Rangoon)

3rd April 1941

LORDS ATKIN, THANKERTON AND ROMER
 AND SIR GEORGE RANKIN AND
 LORD JUSTICE CLAUSON

Maung Sin — Appellant

v.

*Maung Byaung and others —**Respondents.*

Privy Council Appeal No. 57 of 1939.

Administration — Suit held not one for administration—Plaintiff claiming her share in joint property of her husband and his father and brother — Her children also made defendants, who claimed to have their share in the properties determined and partitioned—Children held entitled to relief.

The widow of K, a predeceased son of B, brought a suit against the other son and daughter of B for her share in the joint property of K and his brother and of K, B and the brother of K. The children of K were also made parties as defendants. There was no claim for the administration of the estate of K, nor was there any claim for accounts and other enquiries. The subject-matter of the suit was also not whole of the dead man's estate but a portion. The defendant children claimed to have their interest in the properties determined and partitioned: The pleadings raised a distinct question between the widow and her children as to their respective shares in the subject-matter of the suit, and an issue was framed for the purpose of deciding that question. The preliminary decree directed an enquiry not merely as to the plaintiff's share, but as to the entire share of K in the subject-matter of the suit:

Held that the suit was not a suit for the administration of K's estate. Hence it was not only competent for the Court to ascertain and declare the shares of the three children of K but it was their plain duty so to do. [P 55 O 1, 2]

A. Pennell — for Appellant.

Respondents Ex parte.

Lord Romer.—This is an appeal from a decree of the High Court of Judicature at Rangoon made in a suit that was begun as long ago as 20th December 1912. A complete history of the proceedings in the suit and the events that led up to it would occupy many hundreds of pages of printed matter. But the question to be decided on this appeal is a short one, and the facts material to its decision can be stated with comparative brevity. They are as follows:

One U Baw, a Burman Buddhist, died intestate on 28th December 1907, leaving surviving him a son (the appellant Ko Sin), two daughters, and the widow (respondent 4) and three children (respondents 1, 2 and 3), of a son, Ko Po Cho, who had predeceased him intestate by only 15 days. After some dispute, letters of administration to the estate of U Baw were granted to his son Ko Sin on 14th January 1910. At the time of U Baw's death there were properties both moveable and immovable standing in the joint names of U Baw, Ko Po Cho, and Ko Sin. There were others that stood in the joint names of Ko Po Cho and Ko Sin. But there appear to have been serious disputes between the members of U Baw's family as to the beneficial ownership of these various properties. On 20th February 1910, with a view apparently of settling these disputes, an agreement was entered into referring them and some other matters

to an arbitrator for decision. The parties to the agreement were Ko Sin, his two sisters, Ko Po Cho's widow, Ma Shwe Yu, and two persons purporting to act as guardians of the three children of Ko Po Cho, who at that time were minors. Disputes arose at a later date as to the extent of the duties and powers of the arbitrator under this agreement and under a supplemental agreement of 12th April 1910, between the same parties. Their Lordships are not however concerned with these matters on this appeal, and it is not therefore necessary to consider the precise terms of the agreements. It is sufficient for the present purpose to state that it was provided in effect by cl. 5 of the principal agreement that out of the share in the two beforementioned categories of property found to belong to Ma Shwe Yu and her three children, Ma Shwe Yu was to take one-third and the children were to take two-thirds.

On 10th June 1910, the arbitrator made his award. He did not deal with all the items of property included in the two categories; in particular he excluded from his award such of the items as consisted of mortgages. But he purported to ascertain the shares of the several parties in the remaining items, including the shares in such items of Ma Shwe Yu and her children. It is unnecessary to state in detail the effects of his findings about the several shares. All that need be said about them is that out of the properties in the two categories with which he dealt in his award he found that a very large proportion belonged to U Baw alone, and that the beneficial interest therein of Ko Po Cho was quite small in comparison. On 9th December 1910, Ko Sin applied to have the award filed in Court. This application was opposed on various grounds by Ma Shwe Yu and her three children, the principal ground of their opposition being that the whole award was invalid owing to the minority of the three children. In the end the application was dismissed by the District Judge by order dated 4th October 1912. He was not, he said, prepared to say that the award was invalid or that no suit could be filed to enforce it on the major parties thereto; but it certainly appeared to him that the award was not one which should be filed. No suit was in fact ever filed to enforce it.

Nor for the moment did Ma Shwe Yu take any steps to have the award declared invalid. She merely ignored it, and on 20th December 1912, she instituted the present

suit with the object (amongst others) of obtaining by a decision of the Court a larger share of the properties contained in the two categories of properties mentioned above than had been given her by the award. By her plaint she accordingly set out in Sch. A thereto various properties moveable and immovable standing in the joint names of Ko Po Cho and Ko Sin, and in Sch. B similar properties standing in the joint names of U Baw, Ko Po Cho and Ko Sin. It should be mentioned that in the schedules are to be found not only properties that had been dealt with by the arbitrator in his award, but also properties that had not been so dealt with by him. The original defendants to the suit were her three children and Ko Sin, but U Baw's daughter Ma Nge Ma, who had by this time acquired her sister's interest in the said properties, was added as a defendant shortly after the institution of the suit.

Now the question to be determined upon this appeal is whether, as held by the High Court overruling the District Judge in this respect, the three children although defendants are entitled to have their interests in the properties, the subject-matter of the suit, determined by the Court, or whether they are to be forced into bringing a separate suit for the purpose, a suit in which Ko Sin states that he would rely on the Limitation Act as affording him a complete defence. This attitude of his is dictated by the fact that, as will presently appear, the award has been decided to be a nullity so far as the children are concerned. In these circumstances it is necessary to examine carefully the plaint and the subsequent proceedings in the suit. Ma Shwe Yu alleged in her plaint that all the properties set forth in the two schedules had been acquired by moneys advanced by Ko Po Cho during her coverture, as to the properties in Sch. A, jointly with Ko Sin, and, as to the properties in Sch. B, jointly with Ko Sin and U Baw. She then claimed that under Burmese Buddhist law all the assets and estate acquired during her coverture with Ko Po Cho were the joint acquired property of herself and Ko Po Cho and that she was entitled to an undivided half share therein in her own right and to a life estate in the remainder until partition. The plaintiff consequently—so she alleged—joined her three children as pro forma parties and "for the better representation of the estate of Ko Cho." But the children were by no means merely formal defendants. She was claim-

ing an interest in the subject-matter of the suit adversely to them, and, as it turned out, quite wrongly. For, she had remarried on 27th January 1910, and had thereby forfeited all interest in Ko Po Cho's share in the joint property of the two — an interest which as a matter of fact would seem but for her re-marriage to have been a larger one than the one she claimed. But, apart altogether from this, the children were necessary parties to the suit as is made clear in the next allegation in the plaint. For in that allegation she claimed that the joint estate of herself and Ko Cho or in the alternative the estate of Ko Cho was entitled to a half and third shares respectively in the properties specified in schedules A and B; and the children were certainly interested in the question whether it was the joint estate of the widow and Ko Po Cho or the estate of Ko Po Cho alone that was entitled to share in the scheduled properties. The plaintiff prayed for declarations in accordance with these several allegations, and a partition of the properties. There is no mention of the award in the plaint from beginning to end.

In due course written statements were filed on behalf of two of the children disputing their mother's claim to be interested in more than one-half of the joint estate of herself and Ko Po Cho. Written statements were also filed by Ko Sin and Ma Nge Ma pleading the award as a defence to the action. The plaintiff thereupon filed a reply alleging that the award was invalid. It was subsequently held, however, by the District Judge, on an issue framed with a view of having the point decided, that the award must be treated as valid unless and until the plaintiff filed a suit to set it aside and succeeded in so doing. The plaintiff appealed from this decision but her appeal was dismissed. In the meantime, one of her sons had instituted a suit against Ko Sin and Ma Nge Ma for the purpose of setting aside the award, and subsequently Ma Shwe Yu and her other two children, who had in the first place been added as defendants, were struck out as defendants and added as plaintiffs. It is unnecessary to trace the history of this suit which ultimately came up for decision by this Board. It is sufficient to say that in the end it was decided that the award was not binding upon any of the three children as they were minors at the date of the reference. But the question whether it ought on that account to be treated as a nullity as regards the other parties to the reference

was expressly left open by the Board. This was on 5th May 1925. In the meantime the suit, the subject-matter of the present appeal, had not been entirely at a standstill in the District Court. Issues had been framed including one as follows :

What is the extent of Ma Shwe Yu's interest in the property inherited from Ko Cho as against the children of Ko Cho in regard (a) sole property of Ko Cho, (b) jointly acquired property of Ko Cho and herself?

Their Lordships fail to understand why this issue should have been framed if, as is now contended by the appellant, the shares of the children cannot be determined in the suit. The whole object of the issue must have been to enable the Court to effect a partition between the widow and her children of the properties referred to. No judicial determination of the issue, however, became requisite inasmuch as on 1st August 1918, Ma Shwe Yu and her three children, all of whom had by that time reached majority, arrived at an agreement that the estate of Ko Po Cho should be divided between them in equal fourth shares. On 15th August 1918, a preliminary decree was passed ordering (amongst other things) that enquiries be made (a) as to the property belonging to the estate of Ko Po Cho, (b) as to the liabilities of that estate. It seems reasonably clear that these enquiries were not intended to apply to the whole estate of Ko Po Cho but only to the interest of his estate in the properties included in Schedules A and B to the plaint. There is nothing, however, to indicate that the enquiries were to be limited to ascertaining the share of Ma Shwe Yu in that part of his estate or the liabilities attaching to that share. It was the whole of that part of his estate that was the subject-matter of the enquiries. Directions were subsequently given to the Commissioner entrusted with the enquiries that he was to distinguish between the properties that had and those that had not been adjudicated upon by the award and that as regards the latter the Commissioner was to come to his own findings in respect of them.

The Commissioner having made the enquiries pursuant to the preliminary decree and to the subsequent directions, which enquiries took about eight years to complete, submitted his report to the District Court in 1929. Various objections to the report were filed by the parties, and the matter eventually came before the District Court for the purpose of having a final decree pronounced. On 7th May 1931, the District Judge pronounced judgment. For reasons that

need not be set out here he thought it advisable not to come to any conclusion upon the question whether the award was binding upon Ma Shwe Yu: he left that to the appellate Court. But he held that the shares of the three children of Ko Po Cho were not to be determined in the present suit. It was, he said, a partition suit pure and simple and not a suit for administration. Accordingly, after an exhaustive examination of the Commissioner's report, the parties' objections to it, and a mass of evidence, he contented himself with finding the share in the estate of Ko Po Cho to which Ma Shwe Yu was entitled. He first found what she was entitled to in the items of property numbered 1 to 19 in the schedules to the plaint, which items were the only ones included in the award. As to these items, the Commissioner's report had apparently merely followed the award under which Ma Shwe Yu had got, (a) one-eighteenth share in items 1 to 5, (b) one-twelfth share in items 6 to 17, and (c) one-ninth share in items 18 and 19. Now these shares represented the one-third share to which Ma Shwe Yu was entitled by reason of cl. (5) of the agreement of reference of 20th February 1910, in the interest in these various items found to belong to the estate of Ko Po Cho; so that the shares to which his estate was entitled in the items under the above headings were (a) one-sixth, (b) one-fourth and (c) one-third respectively. But, before the learned District Judge, Ko Sin and Ma Nge Ma through their advocates had stated that they were willing that there should be given to Ma Shwe Yu not only her own interest in these items but also the two-thirds interest therein to which her three children would have been entitled if the award had been binding upon them. And this the learned Judge strangely enough proceeded to do. Having held that the children could not have their proper share in Ko Po Cho's estate ascertained in the present suit (and they would of course have had to be ascertained upon the footing that they were not bound by the award) he nevertheless treated them as though they had been so bound; decreed that their mother was entitled to the shares in the 19 items which they had been awarded; ordered that the properties should be partitioned on that footing; and that the mother should be given possession of the share so decreed to her. The learned Judge apparently also dealt with the properties that were not covered by the award in the same way, decreeing the whole share

of Ko Po Cho in these properties to Ma Shwe Yu, differentiating in no way between her and her children. This was of no great moment to the children as they were willing to trust their mother to carry out the agreement that they had made with her in August 1918. But it was a very different matter as regards the properties dealt with by the award, inasmuch as if the decree of the District Judge were allowed to stand they would be for ever debarred from establishing their right to a larger share in such properties than the arbitrator had given them. Ma Shwe Yu was also desirous of disputing the validity of the award as regards herself. Accordingly she and her three children jointly presented an appeal to the High Court at Rangoon from the decree of the District Judge.

The High Court gave judgment on 22nd March 1937. They dismissed the appeal so far as Ma Shwe Yu was concerned. They held that the award was binding upon her. From this decision no appeal has been brought by Ma Shwe Yu, and their Lordships are not asked to express any opinion about it. But the appeal of her three children was allowed. Mya Bu J., in whose judgment Braund J., concurred, said this :

Whether the suit is to be described technically as a suit for partition or as a suit for administration, it is a clear duty of the Court to declare not only what properties or shares therein formed the estate of Ko Po Cho but also to declare the rights of Ma Shwe Yu and of her children in such properties.

He accordingly held that the final decree passed by the trial Court ought to be set aside and the case remanded to the trial Court for the purpose of enabling the three children to prosecute their claims and of having a proper final decree drawn up after necessary enquiries had been made. As regards such of the properties set out in the schedules to the plaint as were not dealt with by the award, he said that all that would be necessary for the District Court after the remand was to divide the interest of Ko Po Cho therein among the widow and children in accordance with the terms of the agreement of 1st August 1918. But as regards the properties disposed of by the award (namely items 1 to 19 hereinbefore mentioned) he held (a) that the three children must be given an opportunity of claiming which items or shares in items belonged to Ko Po Cho's estate, and that, after Ko Po Cho's interest in such properties had been ascertained, the three children must be declared to be entitled to half that interest upon the footing that they were

entitled to that half as against their mother on her remarriage, (b) that the shares to which Ma Shwe Yu was personally entitled must be declared to be one-third of one-sixth in items 1 to 5, one-third of one-fourth in items 6 to 17, and one-third of one-third in items 18 and 19 in accordance with cl. 5 of the directions in the award, (c) that whatever Ma Shwe Yu was declared entitled to under the head (b) and whatever the three children were entitled to under the head (a) must then be divided in equal fourth shares among them in accordance with the terms of the agreement of the 1st August 1918.

A formal decree was drawn up giving effect to this decision of the High Court, and it is from that decree that an appeal has been brought by Ko Sin (both in his personal capacity and as legal representative of Ma Nge Ma who has died) to His Majesty in Council. It was urged before their Lordships upon the hearing of the appeal (and this was substantially the only point relied on by the appellant) that the suit was not one for the administration of the estate of Ko Po Cho, and that it was not therefore permissible for his three children, who were merely defendants in the suit, to have their shares in the estate ascertained and decreed to them, more especially in view of the fact that the subject-matter of the claim of the plaintiff in the suit was not even the whole estate of Ko Po Cho but merely her share in so much of the scheduled properties as belonged to his estate. It was, the appellant contended, merely a partition suit for the recovery by the plaintiff of that share in severalty. Their Lordships agree that the suit is not a suit for the administration of Ko Po Cho's estate. There is no claim for administration in the plaint, nor is there any claim for the accounts and enquiries usually directed in such a suit. Its subject-matter moreover is not the whole of the dead man's estate but only a portion of it. But this in no way concludes the matter. The pleadings raised a distinct question between the plaintiff and her children as to their respective shares in the subject-matter of the suit, and an issue was framed for the purpose of deciding that question. The preliminary decree, moreover, directed an enquiry not merely as to the plaintiff's share, but as to the entire share of Ko Po Cho in the subject-matter of the suit. In these circumstances it was in their Lordships' opinion not only competent for the Court to ascertain and declare

the shares of the three children of Ko Po Cho; it was their plain duty so to do. In their Lordships' opinion the decree of the High Court should be affirmed and this appeal dismissed. They will humbly advise His Majesty accordingly. As the respondents have not appeared there will be no order respecting costs.

R.K. *Appeal dismissed.*

Solicitors for Appellant — *Lambert & White.*
Respondents *Ex parte.*

(28) A. I. R. 1941 Privy Council 55

(*From Ceylon*)

5th November 1940

LORD ATKIN, LORD THANKERTON AND
SIR GEORGE RANKIN

Cecily Harriett Matilda Peiris —
Appellant

v.

R. M. Sellamuttu Pillai and another —
Respondents.

Privy Council Appeal No. 20 of 1940.

Appeal—Privy Council—Concurrent findings of fact by lower appellate Courts — Rule that Privy Council will not interfere in appeal is not inflexible—When Privy Council will interfere, stated.

The rule that the Privy Council will not interfere in appeal with concurrent findings of fact by the lower appellate Court is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely destructive of the findings of fact. [P 56 O 2]

N. L. C. Macaskie and Stephen Chapman —
for Appellant.

J. M. Pringle and N. R. Fox Andrews —
for Respondents.

Lord Atkin. — This is an appeal from the Supreme Court of Ceylon confirming the District Court of Colombo. The action was brought by the present appellant, the wife of a Mr. Peiris who carried on business as a broker at Colombo. The claim made by her was that there being a property for sale, her husband went to the present respondents and arranged with them that they should purchase the property for his wife because his financial circumstances were such that it was inconvenient that the property should stand in his name, and arranged that they should secure a mortgage on the property; that the whole transaction was carried out in her name; she was the principal and the transaction being carried out in her name, she would be entitled to have the property declared to be hers. That

case which was put forward, though not it seems in the first instance, alternated with the case that all these transactions went through for her, that by agreement made between her husband and the two respondents, the two respondents having undertaken the liability for a loan and having made the purchase in their own names, agreed that she should have one-fourth of the property — the money that represented her share of the purchase price being paid off out of the profits of the whole property which would be received, and were received, by the defendants.

The simple answer that is made by the respondents and was accepted by the Judge of first instance is that that transaction in that form never took place. It seems to have been suggested at one time that the husband should receive from this transaction one-fourth of the property that was bought. No agreement was eventually arrived at. There are documents which indicate that Mr. Peiris, the husband of the plaintiff, had suggested to the solicitors for the defendants that they had agreed to pay him a one-fourth share of the property in consideration for his services in introducing the transaction to them. A draft memorandum came into existence upon that footing, but there was no concluded agreement and eventually it is quite plain that any suggestion that Mr. or Mrs. Peiris should get one-fourth of the property fell through for the reason that neither Mr. nor Mrs. Peiris was prepared to undertake the responsibility for one-fourth of the losses on the working of the estate, if there should be losses. The transaction seems quite plain when one considers it. At that time there was not much prosperity attaching to tea plantations in Ceylon. Eventually the position got much better and if this arrangement had been carried through, Mr. and Mrs. Peiris would have been in a position to say: "Well, the profits have been sufficient to meet this one-fourth of the purchase price". In the circumstances it is almost certain that neither Mr. nor Mrs. Peiris would have had any right or power to claim that one-fourth share.

However, the position here is that the Judge has rejected entirely the story told by Mr. and Mrs. Peiris and he believes the story told by Mr. Weerasooriya, who is a proctor of repute, to the effect that he never was made aware of the transaction as narrated by Mr. Peiris and that there never was a concluded agreement. In those

circumstances it seems plain that the documents must stand as they are. The defendants have taken the property themselves; they did not in fact buy it for Mrs. Peiris or for Mr. Peiris and there was no agreement by which they undertook to give any share of the property which they had bought for themselves either to Mr. Peiris or Mrs. Peiris.

Those are the findings of the District Judge and they are findings of fact. On an appeal to the Supreme Court, the Supreme Court accepted the findings of fact of the learned Judge and they agreed with his reasoning. There are therefore concurrent findings which prevent their Lordships from interfering with those findings of fact. No doubt the rule as to concurrent findings is not so rigid that it might not be departed from if such a state of things existed as facts appearing from some undisputed document which are completely destructive of the findings of fact by the learned Judge, but nothing of that kind appears here. In those circumstances, it is impossible for their Lordships to interfere with the judgments. The result is that the appeal must be dismissed and their Lordships will humbly advise His Majesty accordingly. The appellant must pay the costs. Their Lordships see no reason why there should be more than one set of costs in the circumstances because substantially the issues seem to be the same as regards both the respondents.

G.N./R.K. *Appeal dismissed.*

Solicitors for Appellant — *Cayley & Knight.*

Solicitors for Respondents —
Peake & Co. and Freeman & Cooke.

(28) A. I. R. 1941 Privy Council 56

(From Lahore)

5th May 1941

LORD ATKIN, SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON

*Committee of Management of Gurdwara
Penja Sahib and another —
Appellants*

v.

*Lieutenant Sardar Mohammad Nawaz
Khan and others — Respondents.*

Privy Council Appeal No. 62 of 1939.

(a) Religious endowment — Dedication —
Heavy onus lies on person who asserts that
property belongs to religious institution.

Where the original right to certain property was
with the proprietary body, the burden lies heavy
on the persons who assert that it belongs to a reli-
gious institution to prove dedication by user of the
whole of the land to the purpose of the institution
and it is beside the point to show that the opposite

party's evidence does not exclude the theory of dedication. The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly exacted by the proprietor from persons held in general esteem. [P 60 C 2 ; P 61 C 2]

(b) Religious Endowment.—Practice of certain institution cannot be presumed from practice prevalent in majority of religious institutions.—Rule of practice should be collected from its own constitution or practice as proved in evidence.

Ascetics and religious institutions exhibit great diversity of character and Udasis in particular conform to no single type. In any case to presume that a particular Udasi shrine followed a certain practice because on account of all religious institutions throughout the province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. The rule of practice of the institution should be collected from its own constitution or practice as proved in evidence: 11 M I A 405 (PC), *Rel. on.* [P 61 C 2]

(c) Custom (Punjab)—Religious institution.—No general rule that property acquired by individual members of a religious fraternity belongs to religious institution.

There is no general rule in the Punjab that all property acquired by individual members of a religious fraternity belongs to the religious institution to which they are attached. [P 58 C 2 ; P 62 C 1]

W. Wallach — for Appellants.

J. M. Gover and J. E. Godfrey —
for Respondents.

Sir George Rankin. — The dispute in this case relates to an area of 28 kanals and 1 marla (nearly three acres) situated in the village of Kot Fateh Khan in the Attock district of the Punjab. Within this area lies the tomb (samadh) of a Hindu ascetic Baba Than Singh who is said to have died in or about 1793. This tomb has long been held in veneration and had become a udasi shrine (dehri or deri) before the Punjab came under British rule. The tomb of his disciple Chet Ram lies near to that of Than Singh, but the religious institution is known as the Deri Baba Than Singh. It would appear to be in enjoyment of one if not two jagirs or assignments of revenue dating from Sikh times. At its head there has been a long succession of mahants and in the area now in question have lived the sadhus connected with the institution as well as the mahant. A langar or free kitchen with certain buildings attached thereto has also been maintained there. The various compounds or closes comprised in the area are referred to in the judgments and decrees of the Courts in India as *ibatas* Nos. 179 to 280, these being the numbers given to them

in the khasra abadi register of 1862 at the first regular settlement.

The village is said to have been founded in the 16th century by an ancestor of respondent 1 Lieutenant Sardar Mohammad Nawaz Khan (herein called the respondent). Its inhabitants, apart from those connected with the shrine, are Muslim cultivators and one or two kamins e. g., the blacksmith, the carpenter. At the first regular settlement in 1862, the proprietors consisted of a number of members of the respondent's family, but in or about 1882 a partition was made between three branches of the family. By this the village was divided into three portions called Abadi Kot Khas, Abadi Kot Bala and Abadi Deri Baba Than Singh. This last portion was included in the share which fell to the respondent's predecessor. It includes the land in suit which is separated from that part of the village Kot Khas in which the cultivators and kamins live by some 30 yards or more of cultivated land.

The respondent was a minor when in 1903 he succeeded to the property on the death of his father, and from 1903 to 1924 the Court of Wards was in charge of his estate. Since 1924 the respondent has had the management of his own property and has asserted rights as proprietor of the village over the area in question which are now contested by those interested in the shrine. It is not now disputed by the respondent that the sites of the two samadhas must be treated as having been dedicated to the religious institution and that the langar buildings belong to it permanently. But he contests the appellants' claim on behalf of the shrine that the whole area of 28 kanals and 1 marla together with the various houses thereon is in the same position as the samadhs, and that he has no right in it; as also their claim that in any event the right of occupation is vested in the shrine and continues so long as the shrine exists. He claims moreover certain rights by village custom in the malba or materials of which the houses are built, which rights are denied by the appellants. These matters came originally before a tribunal constituted under the Sikh Gurdwaras Act (Punjab Act 8 of 1925). An application having been made to have the shrine declared to be a Sikh gurdwara, the mahant objected that it was a Udasi institution and not within the Act. The respondent by petition dated 25th April 1931, objected that the area claimed as belonging to the institution was his sole property; that he was the owner of the malba of the

houses and buildings, and that their sites reverted to him if a non-proprietor occupant died childless, or abandoned the building, or alienated it without his permission. In effect, his claim was to treat the mahant and the sadhus as non-proprietors occupying separate houses with permission of the proprietors and subject to the rights which the custom of the village gave to the proprietor. The mahant's objection at first succeeded but in March 1935, it was compromised on appeal to the High Court and the institution was declared to be a Sikh gurdwara. It thus became necessary to decide the various matters raised by the respondent's petition and the Tribunal received oral and documentary evidence thereon in considerable quantity. On 18th November 1935, the Tribunal by a majority determined that the petitioner is owner of the sites of ihatas Nos. 179 to 230 but as long as the shrine exists there is no right of reversion in favour of the petitioner; it has a right of occupation of the whole area of 28 kanals 1 marla and there is no right of reversion, in favour of the petitioner, of the site or malba of any house over this area in the event of the occupant thereof dying issueless or abandoning or alienating the building without the permission of the proprietor.

Apart from the two samadhs and the langar, Hilton J. the President of the Tribunal dissented from this decision of his two colleagues save as regards the declaration of the respondent's ownership. On appeal to the High Court, Coldstream and Blacker JJ. agreed with Hilton J. The High Court's decree of 16th July 1936, declared the petitioner (the present respondent) to be the owner of the sites of ihatas Nos. 179 to 230 "except the sites of the two gurdwaras Dehri Bhai Than Singh and Dehri Bhai Chet Ram;" and also to be entitled to the malba of the superstructures situated on the disputed areas in the event of the occupant thereof dying issueless or abandoning or alienating the building without the proprietor's permission. From this last declaration, however, they excepted the superstructures of the "gurdwaras" and of the langar and the buildings appertaining thereto. Neither of the Courts in India has taken the view, for which the appellants contend, that the area in dispute has as a whole become dedicated to the shrine so as to make an end of the respondent's ownership therein. But the two members of the Tribunal who were in the majority considered that the right of occupation, whether or not given at different times to individual sadhus, was given to the institution, which occupied the various houses

through them as its members. Rai Bahadur Lala Dwarka Parshad said in his judgment that "it was a case of dedication by user"; also,

it is the shrine that has the right of occupation over this whole area of 28 kanals and so long as it exists there is no case of reversion to the Sardar.

The other member, Sardar Man Singh, added that as the sadhus were all ascetics whatever they acquired was for and on behalf of the dehri and not for themselves. For this he vouched as authority para. 89 of Rattigan's "Digest of Civil Law for the Punjab":

89. All property acquired by individual members of a religious fraternity belongs, as a general rule, to the religious institution to which they are attached.

The papers prepared in 1862 at the first regular settlement were prepared before the village had been partitioned and at a time when there were a considerable number of proprietors. The khasra abadi register (a list of inhabited sites) and the map of 1862 disclose some sixty "ihatas" as being houses or areas of land held therewith in the occupation of individuals who are for the most part without women or children. The great majority of them if not indeed all are clearly sadhus, but in two cases it is noticed that one house is a school and the other a police station. The sadhu in every case is entered in the register as "owner" of the house, but too much need not be made of this expression. In another of these settlement papers — a statement of owners' and tenants' holdings called the mumtakib as-samiwar khasra — the owner as distinct from the tenant is entered as "shamilat deh" (village common land). In the wajib-ul-arz prepared at this time it is stated in para. 8 relating to "income from cesses":

A person who wishes to take up residence, does so with our (proprietors') permission. If a person demands any help for the construction of a kotha, he is helped with wood. He is entitled to reside as long as he likes. When he deserts the place, he is not entitled to sell the house. After he has left, the proprietor of the place shall be entitled to Malba. The proprietor may make Abad in the kotha any person he likes, subject to the condition that if the former returns to the village after 2-4 years and his house is in a sound condition, then he is given on his request the same kotha for residence.

The only point material to the present case in which this differs from the ordinary custom (set forth in para. 236 of Rattigan's "Digest") concerns the right to the malba — the latter giving to the non-proprietary resident a right to sell the materials of the house on his occupation ceasing. In 1882, the mahant having died, a question arose as to

the continuation by Government of the jagir of the village of Jassian and the revenue Court required the tahsildar of Fateh Jang to report on the condition of the dehri now in question and its langar. This official requested Sardar Fateh Khan a predecessor of the respondent to inquire, and his report of 10th June 1882 (Ex. O/31) is in evidence. It describes this abadi as a separate and important colony and it gives the dehri a good character, saying that its kitchen not only feeds its sadhus and fakirs but also wayfarers and that it gives each fakir one rupee per month for clothes, etc. The appellants also seek to rely on Ex. O/32 a "list of houses attached to Dehri Baba Than Singh" made out — it does not appear by whom—for the revenue Court on this occasion. This list has been treated as inadmissible by the High Court but, if it be admitted, it shows the bulk of the houses as having a sadhu for "owner", though a number are entered as musafirkhana making them appear as intended for use by wayfarers rather than residents — an appearance which would make a better impression upon any revenue official dealing with the continuation of the jagir: otherwise it does not substantially alter the picture presented by the settlement papers of 1862 save that it shows the pakka buildings to be 16 and the kacha to be 42.

At the second regular settlement of 1882 in the khasra paimaish papers (statement of measurements) under the heading "owner" in respect of these 28 kanals 1 marla is the entry "village abadi." The area itself is described as unculturable inhabited land (abadi ghair mumkin). In the Record of Rights at the third settlement, 1905, and at the fourth, 1925, the entry "village abadi" is put in the column headed "tenant" as well as in the column headed "owner" and to the description ghair mumkin abadi is added "of Dehri Baba Man Singh"—which the respondent claims to be in recognition of the partition of 1882. In none of the settlements after the first is there any entry in a settlement paper corresponding to the entry which has been cited with reference to persons wishing to reside in the village. This the High Court has noted, but the learned Judges following a previous decision of their own Court in 17 Lah 403,¹ have held that it does not detract from the force of the entry as after the first settle-

ment the revenue authorities did not concern themselves with recording rights in the village abadi. This is a matter of the revenue history of the province and their Lordships see no reason to think that the High Court is not correctly informed.

Two matters which their Lordships do not find it necessary to discuss may here be mentioned and put aside. The first is an arbitration held in 1904 by an Assistant Commissioner, Mr. C. F. Usborne, in a dispute about the right to receive the rents paid for shops opened or erected in the area in suit at the time of the Baisakhi fair. The award of 27th March 1904, was that half the rent should be taken by the respondent and the other half by the sadhu in whose house the shop was put up. Both sides crave this in aid, the respondent pointing to the fact that the houses were held to belong to the individual sadhus, the appellant to the fact that the proceedings were brought by the mahant. The second matter is the claim made by the respondent in 1925 to receive huq buha or door tax from the mahant Parkasha Nand under the wajib-ul-arz of 1862. This claim succeeded before the revenue Courts which were ultimately held by the Board to have exclusive jurisdiction over the claim, but doubts had been thrown upon the right by opinions of the civil Courts and the Board did not pronounce upon the matter: 65 I A 301.² Their Lordships are not to be understood as thinking that the results of these two disputes are irrelevant in the present case. On the contrary, their view is that on balance they are not without weight in favour of the respondent but that in view of more direct and cogent evidence a discussion of them would encumber the present case unnecessarily.

The respondent's 59 witnesses may be taken to establish that since he came of age in 1924 he has exercised the rights claimed by him and the appellants' evidence is that of late years he has done so somewhat harshly having had a number of the kacha houses demolished. On the other hand — and Mr. Wallach for the appellants has most forcefully laid stress upon this as his main point—the respondent's evidence does not include anything to show that his father before his death in 1903 or any previous proprietor had taken possession of sadhus' houses on their death or departure from the village or had otherwise exercised the cus-

1. ('86) 28 A I R 1936 Lah 894 : 166 I O 157 : 17 Lah 403 : 38 P L R 887, *Dhuman Khan v. Gurmukh Singh*.

2. ('38) 25 AIR 1938 P O 219 : 175 I O 769 : I L R (1938) Lah 514 : 65 I A 301 : 32 S L R 835 (PC), *Mohammad Nawaz Khan v. Bhagata Nand*.

tomary rights now claimed. For the time (1903 to 1924) of the management of the Court of Wards while the respondent was a minor, there is some such evidence. The responsible official who was a manager from 1918 to 1923 (P. W. 5) speaks to the supply of timber to a sadhu called Budh Prakash and says that the house of another sadhu called Narain Das was on his death, about 1922, taken by the Court of Wards. The evidence of this witness (P. W. 5) as also of the assistant managers from 1914-17, 1917-23, and of several other witnesses shows that there was no musafirkhana in this part of the village, though witnesses for the appellants say that the people of Qutbal about 1917 built one which has been demolished. One sadhu Bawa Mohan Das (P. W. 24) fully supports the respondent on all points but is much exposed to suspicion of partisanship. Some at least of the sadhus appear to have had chelas who lived with them and in some cases at least the chela succeeded in fact to the possession of the guru's house at his death. The witnesses called for the appellants include some who say in general terms that the sadhus' houses were given to them by or belonged to the dehri, or that the sadhus were living through the mahant, or that when a sadhu went away the mahant got the key of his house and managed it, or that the mahant got the sadhus' houses repaired or that pilgrims were put up in the houses as the mahant directed. But this evidence is poor in quality and is wholly lacking in particulars. The Mahant Bhaqta Nand who succeeded Parkasha Nand in 1928 and who compromised with the appellants in 1935 over their claim that the shrine was not a Udasi institution but a Sikh gurdwara was called on their behalf and said that all the kacha houses except three or four were in his possession and were the property of the dehri, that he used some of them for his servants and some as storehouses. On the other hand he says :

I took the right of residence from Garib Das and also from Sarup Das. If a sadhu lives in a certain house he cannot be ousted by the mahant unless he does something against the principles of the dehri sahib but no sadhu could alienate his right of residence to anybody except the dehri sahib.

The general effect of the evidence for the appellants is that in 1889 and down to 1938 the houses in this abadi were some forty or fifty in number of which a dozen or so were pakka, i.e., built of masonry, while the rest were kacha, i.e., of mud and stones; and that all, or all save three or four, had been demolished recently, that is about 1934. The

Court of Wards manager says that in his period of office (1918 to 1923) the pakka buildings were the langar, the mahant's bungalow, the main dehri, the second dehri and two houses one on each side of the latter. Also that there were about twelve kacha houses inhabited by sadhus most of whom lived there permanently but some of whom came and went though they had houses there. The papers of 1862 show some 68 compounds but apparently the number of sadhu tenants holding houses is in the neighbourhood of thirty. The list, exhibit O-32, given to the revenue Court in 1882 mentions 16 pakka and 42 kacha buildings. The general effect of this evidence is to show that between 1862 or 1882 and 1920 or thereabouts there was a considerable diminution in the number of the kacha houses but their Lordships are not prepared to go all the way with Hilton J. in saying "that this fact can only be attributed to the proprietor having gained possession of them according to the custom." If the number of sadhus for any reason became less, such houses, unoccupied, would tend to fall down and might not be repaired or rebuilt by the mahant or by anyone else whether they belonged to the dehri or to the individual sadhus.

It appears unreasonable on the evidence to doubt that the original right in the land in suit was with the proprietary body. Hence the first question is whether the appellants have proved a dedication by user of the whole of the area to the purposes of the shrine. This burden lies heavy on the appellants and it is beside the point to show that the respondent's evidence does not exclude the theory of dedication. For practical purposes, the shrine would hardly be treated as other than a permanent institution, and it is not easy to envisage conduct which would show an intention to dedicate the right of occupation until such time as the shrine should cease to exist and which would yet fall short of a simple out-and-out dedication of the whole interest as in the case of the samadhs themselves. But, in their Lordships' opinion, the evidence falls far short of establishing that the individual houses of the sadhus were dedicated to the shrine in either sense or at all. The settlement papers of 1862 and of the later settlements make it almost hopeless to challenge, as regards this abadi of some three acres, the proprietorship of the respondent. They exclude any suggestion that in 1862 or later the mahant had become entitled to the

abadi by any form of dedication and indeed there is no trace of any such claim having been brought to notice at any of the settlements or having been taken account of at the time of the partition between the members of the proprietors' family. Yet the case now made by the appellants and pleaded in their written statement of 20th July 1935, is that the respondent "has no right, title or interest in the said area." That the right of occupation but not the proprietorship has been dedicated is not an impossible position as a matter of law, and it might be affirmed without contradicting the entries in the settlement papers as to the proprietorship. But it is equally inconsistent with the settlement papers to suppose that the mahant or the dehri sahib itself was the sole and quasi-permanent tenant of this area. No trace of such a claim can be discerned in the map or khasras of 1862. The individual occupiers of the different houses are set forth in detail as the persons having the right of occupation. For the purposes of the question whether the proprietors' rights in those three acres of abadi have been parted with wholly or partially by way of dedication to the shrine, the particular custom as to malba laid down in the wajib-ul-arz of 1862 is only of subsidiary importance. If it be postulated for the sake of argument that the case falls under the general custom referred to by Hilton J. and stated in Rattigan's Digest in para. 236 the case as to dedication is not substantially altered though the claim to malba would be inconsistent with the assumption made. But their Lordships agree with the High Court in thinking that the special custom is proved, and in any case they think it reasonably clear that individual sadhus minded to attach themselves to the shrine were from time to time permitted by the proprietors to set up for their own habitation kacha houses in its neighbourhood, thus making it an abadi fairly enough described as a separate colony—a colony which not only enjoyed considerable reputation but also had the good will of the respondent's predecessors such as Sardar Fateh Khan. The absence of evidence that the respondent's predecessors refused to allow one sadhu to succeed another in the occupation of the houses, or took away the materials, or installed a different class of tenant, is sufficiently explained by the circumstances and by the lapse of time and in no way warrants an inference of dedication whether of the right of occupation or of the whole interest in the land. Such a conclu-

sion requires to be supported by clear and specific evidence of individual transactions which require the hypothesis of dedication to account for them—all the more so that it is contrary to the custom recorded in 1862 and to the position recorded at four settlements. The case of dedication is not made out merely by evidence of neighbourly or considerate conduct towards a religious institution or by showing that small profits have not been churlishly exacted by the proprietor from persons held in general esteem. Nor is it to be made out by showing that the sadhus dependent on the mahant got his help for repairs, or allowed him to assign pilgrims to them at the time of mela, or sought his help in other ways. As Hilton J. has observed, "there is no evidence that the manager of the institution obtained the proprietors' permission to build houses for sadhus." There is moreover no foundation for the contention that the mahant was in management and control of the houses occupied by sadhus in such sense that the sadhus enjoyed a sort of service occupation of the property of the institution. Save as regards the samadhs themselves and the langar buildings the case of dedication by user fails.

The appeal made to para. 89 of Rattigan's "Digest" is in these circumstances of no avail to the appellants. If it were intended as the statement of a legal presumption based upon a general custom of the Punjab, their Lordships, in view of the wide sweep of the proposition and of the importance of presumptions in India, would have desired and indeed expected ampler authority for it than they have been able to discover. Of the two cases cited as authority by the learned author their Lordships have been able to examine the first, 21 P R 1874,³ and cannot find that it affirms any such proposition. Ascetics and religious institutions exhibit great diversity of character and Udasis in particular conform to no single type. In any case to presume that a particular Udasi shrine followed a certain practice because on a count of all religious institutions throughout the province the practice was found to obtain in a majority of the cases is a course of reasoning unwarranted by principle or authority. Their Lordships would be very slow to apply to such an institution as this dehri a rule not collected from its own constitution or practice as proved in evidence. Of the rule now in question it may be further said that un-
3. (174) 21 P R 1874, *Tota Puri v. Padam Puri*.

less it be written large in the conduct and history of the "fraternity" the greatest doubt is thrown upon it. However, from the introduction to Chap. 6 of the "Digest" and from para. 84 it appears that the force of such considerations did not escape the learned author, who insists that there is no general law applicable to religious institutions in the Punjab and appears to recognize in the light of long-standing decisions of the Board that they are to be governed only by customs and usages which they can be shown to accept. Thus in 11 M I A 405⁴ at p. 428, a case about a Hindu math in Bengal, it was said by the Board:

The only law as to these mahants and their office, functions and duties is to be found in custom and practice, which is to be proved by testimony.

Paragraph 89 of the "Digest" is not really put forward as a statement of any legal presumption: though it uses the words "general rule" it is not the statement of a rule but of something which has been found by enquiry to be true of most fraternities. Their Lordships are not satisfied that the sadhus living in this abadi were members of such a "fraternity" as is contemplated by the paragraph; but, whether they were or were not, it is, in their Lordships' view, established by the evidence that the houses in which the sadhus lived were treated by them and by the mahant as their own and not as belonging to the dehri. It cannot, in these circumstances, be held that the rights which the sadhus obtained as a result of their being allowed to live in this abadi became enlarged as against the respondent by virtue of any such rule as is put forward. Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the costs of respondent 1. The Registrar in taxing such costs will take note of and deal with any complaint made by the appellants as to the inclusion in the record of unnecessary documents such as those specified in para. 9 of the appellants' case.

K.S./R.K.

Appeal dismissed.

Solicitors for Appellants — *Charles Russell & Co.*

Solicitors for Respondents —

Sharpe Pritchard & Co.

4. ('67) 11 M I A 405: 8 W R 25: 2 Suther 86: 2 Sar 306 (P C), *Greedharee Doss v. Nundokissore Doss*.

(28) A. I. R. 1941 Privy Council 62

(*From Lahore*)

('37) 24 A. I. R. 1937 Lah 806

28th April 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER, SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON.

Sardar Nisar Ali Khan and others

— *Appellants*

v.

Mt. Fatima Sultan and others

— *Respondents.*

Privy Council Appeal No. 17 of 1939.

Custom (Punjab) — Succession — Custom modifying ordinary law of succession must be ancient and invariable and should be established by unambiguous evidence—Burden of proof lies heavily on plaintiff — Custom of succession by males only—Case of succession consistent only with aforesaid custom must be established—Cases of succession in family by males only capable of explanation other than alleged custom are not enough.

A special custom modifying the ordinary law of succession must be ancient and invariable and should be established to be so by clear and unambiguous evidence: 14 M I A 570 (P C) and ('17) 4 AIR 1917 PC 181, *Rel. on.* [P 68 C 1]

In every case of this kind the burden of proof lies heavily on the plaintiff: ('17) 4 AIR 1917 P C 181, *Rel. on.* [P 68 C 1]

For the purpose of establishing a custom excluding females from succession cases of succession in the family by males only being capable of some explanation other than the alleged custom are not enough. Cases of succession which were consistent only with the existence of the alleged custom i. e. which could only have taken place if the alleged custom in fact prevailed in the family must be shown. The plaintiff's former denial of the alleged custom excluding females from succession, the recording of the plaintiff's cousin's land as having devolved upon his heirs according to Mahomedan law and the mutation of the plaintiff's father's land in the name of his widow and daughters as well as his sons constitute strong pieces of evidence against the alleged custom excluding females from succession: ('32) 19 A I R 1932 P C 172, *Expl.* [P 68 C 1, 2]

W. A. Barton and J. M. Pringle —

for Appellants.

Sir Thomas Strangman and W. Wallach —

for Respondents.

Lord Russell of Killowen.—This is an appeal from a judgment and decree of the High Court of Judicature at Lahore, which reversed a judgment and decree of the Assistant Collector of Lahore, and dismissed the suit of three of the present appellants. The suit was brought by three sons of the late Sir Fateh Ali Khan against seven defendants, viz., Sir Fateh's widow and his five daughters. A fourth son who was absent in England was also joined as a defendant. The relief claimed was a declaratory decree to the

effect that the plaintiffs and the defendant son were the heirs of Sir Fateh, and exclusive owners of the lands specified in the plaint; and that the defendants, the widow and daughters, had no right therein. The foundation of the claim was that by the custom of the family women did not inherit. The family are Shiah Mahomedans of the Asna Ashari sect. The alleged custom was admitted by the widow and all the daughters, except one, viz., Fatima Sultan. The Assistant Collector held that the alleged custom has been proved, and gave judgment decreeing the suit on 8th May 1935. Fatima Sultan appealed to the High Court and on 18th January 1937, the judgment of that Court was pronounced allowing the appeal and dismissing the suit. From that decision the four sons have appealed to His Majesty in Council. The question for their Lordships' consideration is whether the plaintiffs have proved the alleged family custom; but before stating the conclusion which they have reached, their Lordships think it advisable to recall certain statements previously made by the Board when dealing with alleged departures from the ordinary laws of succession. In 14 M I A 570¹ at p. 585 the Board stated that:

It is of the essence of special usages modifying the ordinary law of succession that they should be ancient and invariable; and it is further essential that they should be established to be so, by clear and unambiguous evidence;

and in 45 I A 10² their Lordships observed at p. 19 that "in every case of this kind the burden of proof lies heavily upon the plaintiff." Furthermore, their Lordships in the last mentioned case repeated with approval a passage from the judgment in 8 Mad 464³ at p. 465 which runs thus:

But instances of this kind will be found to occur where there is no doubt that the family is governed by pure Mahomedan law. Indeed in many parts of the country it is unusual for Mahomedan ladies to insist on their unquestioned rights. They will often prefer being maintained by their brothers to taking a separate share for themselves. . . . Moreover Mahomedan females are so much under the influence of their male relatives that the mere partition of the property among the males without reference to them, cannot count for much.

In the present case the evidence is neither clear nor unambiguous. The cases deposed to of successions in the family by males only

are of comparatively recent date and are all capable of some explanation other than the alleged custom. No case of any such succession was proved which was consistent only with the existence of the alleged custom, i. e., which could only have taken place if the alleged custom in fact prevailed in the family. Their Lordships agree with the conclusion which the High Court reached after a careful examination and analysis of the evidence adduced by the plaintiffs; and they concur in the view that (1) the plaintiff Nisar Ali's former denial of the alleged custom, (2) the recording of Ali Mahamad Khan's land (after enquiry from his son) as having devolved upon his heirs according to Mahomedan law and (3) the mutation of land in favour of Sir Fateh's widow and daughters as well as his sons, are three strong pieces of evidence against the contentions of the plaintiffs. After considering the evidence adduced their Lordships feel no doubt that the plaintiffs have failed to prove that the alleged custom of excluding women from succession exists in the family.

Their Lordships think it right to add that they have an uneasy feeling that the Assistant Collector was to some extent influenced in arriving at a view in favour of the plaintiffs by certain words used by Lord Tomlin in delivering the judgment of the Board in 59 I A 268⁴ at p. 272. In the course of the judgment, it was stated that this family "are Shiah Mahomedans of the Asna Ashari sect governed by the Imamia law. By family custom women do not inherit." The question of the existence of such a family custom was in no way before the Board for consideration, or determination. The sentence was taken from the respondent's printed case merely as a description and what was thought to be a proper description, of the family. It was in no sense, nor was it intended to be, a pronouncement, much less a decision, upon this vexed question of family custom. It should not have been counted as of any weight in arriving at a decision in the present litigation. It was, in their Lordships' opinion, unfortunate that the Assistant Collector should have been misled into regarding it as a pronouncement of importance and relevant to the present case. For the reasons which they have indicated their Lordships are of opinion that this appeal should be dismissed, and they will humbly advise His Majesty

1. ('70-72) 14 M I A 570 : I A Sup Vol 1 : 17 W R 558 : 12 Beng L R 396 : 2 Suther 603 : 3 Sar 108 (P O), Ramalakshi Ammal v. Sivanantha Perumal Sethurayar.

2. ('17) 4 A I R 1917 P O 181 : 48 I O 306 : 45 Cal 450 : 45 I A 10 : 12 S L R 104 (P O), Abdul Hussein Khan v. Bibi Sona Dero.

3. ('85) 8 Mad 464, Mirabivi v. Vellayana.

4. ('92) 19 A I R 1932 P C 172 : 137 I O 599 : 59 I A 268 : 7 Luck 324 (P O), Nisar Ali Khan v. Mohammed Ali Khan.

accordingly. The appellants will pay the costs of the appeal.

G.N./R.K. *Appeal dismissed.*

Solicitors for Appellants — *Peake & Co.*

Solicitors for Respondents —

Douglas Grant & Dold.

(28) A. I. R. 1941 Privy Council 64

(From Baluchistan at Quetta)

28th April 1941

LORDS ATKIN, RUSSELL OF KILLOWEN,
AND ROMER, SIR GEORGE RANKIN AND
LORD JUSTICE CLAUSON

Secretary of State — Appellant

v.

*Sardar Rustam Khan and others —
Respondents.*

Privy Council Appeal No. 50 of 1939.

Foreign Jurisdiction Act (1890), S. 1—Agreement — Khan of Kalat granting to British Government by agreement in 1903 perpetual lease of Nasirabad Niabat part of Kalat territory at quit rent and ceding entire management of territory absolutely and with all rights and privileges, State or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration — Prior to agreement predecessors of plaintiffs holding proprietary rights over certain lands comprised in agreement — After agreement Government treating aforesaid lands as Government unoccupied lands—Suit by plaintiffs claiming that Government had no title to lands granted to them by Khan of Kalat—Agreement held was not mere "commercial agreement" but created rights between two sovereign States — Government held had full sovereign rights over territory and its act in refusing to recognize plaintiff's title to suit lands being act of State plaintiffs could have no recourse against Government in Municipal Courts.

By an agreement in 1903 between the Khan of Kalat and the Agent to the Governor-General in Baluchistan the Khan of Kalat granted to the British Government a perpetual lease of the Nasirabad Niabat a part of the Kalat territory at a quit rent and ceded, in perpetuity the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges State or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration. Over part of the land comprised in the agreement the predecessors of the plaintiffs held proprietary rights granted to them prior to 1903 by the then Khan of Kalat and the grants continued to be of full force up to the date of the agreement. After the agreement the Government of India made a settlement of the territory and recorded certain lands including those comprised in the grant to the predecessors of the plaintiffs as Government unoccupied lands. The plaintiffs brought a suit claiming that as the lands in suit were comprised in their grant from the Khan of Kalat the Government had no title to them and could not treat them as Government unoccupied lands :

Held that (1) the agreement was not a "commercial contract" intended only to effect a more convenient method of collecting revenue and granting powers only for that object ; [P 66 C 2]

(2) the agreement created rights between two sovereign States. The British Government were to exercise the rights and privileges ceded to them in as ample a manner as if acquired by conquest or cession by virtue of S. 1, Foreign Jurisdiction Act: [P 66 C 2; P 67 C 1]

(3) the agreement gave the British Government full sovereign rights over the territory and they had a right to recognize or not to recognize the existing titles to land. The act of the British Government in not recognizing the title of the plaintiffs to the suit lands was an act of State for which the plaintiffs could have no recourse against the Government in Municipal Courts : 7 M I A 476 (PC); (1899) A C 572; ('15) 2 AIR 1915 P C 59; ('24) 11 AIR 1924 P C 216 and ('30) 17 AIR 1930 P C 267, *Rel. on.* [P 67 C 2; P 68 C 1]

J. Millard Tucker and J. M. Pringle,—

for Appellant.

*R. Gibson, Sir H. S. Gour and S. P. Khambata
— for Respondents.*

Lord Atkin. — This is an appeal by special leave from the judgment of the Additional Judicial Commissioner in Baluchistan, in which in the respondents' suit he made a decree declaring their title to and granting them possession of the lands in suit. The appeal raises an important question as to the powers of the British Government over the sub-division of Nasirabad, part of the territory of the Khan of Kalat under a document dated 17th February 1903, purporting to be an agreement made between the Khan of Kalat and Colonel Yate, Agent to the Governor-General in Baluchistan. The agreement was expressed to be subject to the confirmation of the Viceroy and Governor-General in Council, and was duly confirmed on 14th May 1903. The circumstances in which the agreement was made appear to be that for many years part of this district had been irrigated by canals flowing from the Indus, and that arrangements had been made between the Khan and the British Government by which occupiers of land benefited were made subject to a water-tax assessed by British officials, collected by Kalat officials, of which the proceeds were divided equally between the two Governments. This species of dual control naturally proved irksome, and the remedy was found in the agreement in question styled, without prejudice to its accurate description in law, the Treaty of 1903. It is in the following terms :

Agreement entered into by His Highness the Khan of Kalat, Mir Mahmud Khan, G. O. I. E., on the one part, and by the Hon'ble Colonel O. E. Yate, C. S. I., C. M. G., Agent to the Governor-General in Baluchistan, on the other part, subject

to the confirmation of His Excellency the Viceroy and Governor-General in Council.

Executed at Sibi on the seventeenth day of February, one thousand nine hundred and three.

I. Whereas it has been found by experience to be to the advantage of both the British Government and His Highness Beglar Begi Mir Mahmud Khan, G. C. I. E., Khan of Kalat, that the Niabat of Nasirabad should be exclusively managed by the officers of the British Government, it is hereby declared and agreed as follows :

His Highness Mir Mahmud Khan, Khan of Kalat, on behalf of himself and his heirs and successors, hereby makes over and cedes in perpetuity to the British Government the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, state or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other powers of administration, including all rights to levy dues and tolls on the following conditions :

(1) That the said Niabat shall be administered, on behalf of the British Government, by or through such officer or officers as the Governor-General in Council may appoint for the purpose with effect from the 1st day of April, one thousand nine hundred and three, or such subsequent date as the Government of India may take it over.

(2) That the British Government shall pay to His Highness on the first day of April, one thousand nine hundred and four and thereafter, annually, on the first day of April each year, fixed annual rent of Rs. 1,15,000 (one hundred and fifteen thousand.)

(3) That the aforesaid sum of Rs. 1,15,000 (one hundred and fifteen thousand), shall be paid to His Highness without any deduction of cost of administration.

II. The boundary of the Nasirabad Niabat as described by His Highness the Khan of Kalat's Naib, Ghaus Bakhsh in July 1902 is as follows :

On the South the Sind Border, on the North, commencing eastwards at the Leni Burj, it runs North-Eastwards along the Mazari border to the Bugti Hills. It follows the foot of these Hills running in a westerly direction to their nearest point to the Shahpur Road near the Manak Garhi Nulla. It then follows this Nulla as far as the Shahpur Road, then follows the Shahpur Road South as far as the Deh Chattan lands (generally known as Dodaika) and, then turns West following the boundary of Dodaika to the Nurwah Channel above the point to where the water reaches. It then follows the Nurwah as far as the junction of the latter with the Dur Mohammad Wah, which is shown on most maps as the Shahiwhah, a continuation of the main desert canal. From this point it follows the Dur Mohammad Wah right along its course to the West and South-West crossing the railway at mile 868, five miles North of Jhatpat Station, until it meets the line of pillars erected about 4 years ago by the Magassis and Jamalis as their mutual boundary. It then follows this line of pillars Southwards to the Sind border, passing about 500 yards to the West of the point where the Bonwah has been closed.

III. Whereas it is possible that the lower portion of the Manjuti lands enclosed by a straight line drawn from the place where the Dur Mohammad Wah crosses the railway, near mile 868, to a point on the Jacobabad-Shahpur Road, 8 miles to the

north of where the Dur Mohammad Wah crosses that road may hereafter be brought under irrigation, His Highness the Khan of Kalat hereby agrees, on behalf of himself, his heirs and successors, to make over and cede to the British Government in perpetuity that portion of the Manjuti land in the same manner as the Nasirabad Niabat above referred to, and it is hereby agreed that the British Government shall pay to His Highness annually an additional rent of rupees two thousand five hundred, making a total quit-rent of Rs. 1,17,500 to be paid on the first day of April one thousand nine hundred and four and subsequent years.

IV. And whereas it is advisable that any further Kalat State lands outside the present boundary of the Nasirabad Niabat which may hereafter possibly be brought under irrigation by branches and extensions from existing British canals should also come under British administration in the same manner as the Nasirabad Niabat above referred to, His Highness the Khan agrees to make over on lease in perpetuity any lands in the Lehri Bhag and Gandawa Niabats that may hereafter be found to be irrigable from existing British canals at a fair quit-rent which can be determined when the surveys have been completed.

MIR MAHMUD KHAN

CHAS. E. YATE, Colonel.

Agent to the Governor-General in Baluchistan.

CURZON

Viceroy and Governor-General of India.

This agreement was ratified by His Excellency the Viceroy and Governor-General of India at Simla on Thursday, this 14th day of May 1903.

LOUIS W. DANE,

Secretary to the Government of India in the Foreign Department.

Over part of the land comprised in the agreement the predecessors of the plaintiffs held proprietorial rights granted to them by the then Khan of Kalat. For the purposes of this case it may be assumed that the grants continued to be of full force up to the date of the agreement. After it had been made the Government of India decided that there should be a settlement of the territory on the lines of the settlement in Sind. A civil servant with experience of Sind, Mr. Smart, was appointed and began work in October 1905, which he completed in April, 1907. The principles to be adopted in determining what existing titles, if any, were to be recognised in the settlement were decided from time to time in the course of the work. The district was treated as divided into two sections, the eastern and the western, the former being better irrigated and more cultivated than the western, in which the lands in suit are situate. This section has an area of about 872,000 acres, of which a large part was waste and uncultivated. In October, 1906 there was a conference between the Agent to the Governor-General and the Revenue Commissioners in Balu.

chistan and Mr. Smart, in which decisions were made which were carried out in the settlement record, and in respect of which the present dispute arises. It will be convenient to set out in the words of Mr. Smart in his settlement report the principles upon which the settlement proceeded.

3. The method of inquiry pursued in the preparation of the settlement records has been the same for the eastern and western sections with one exception. In the eastern section it was considered necessary to make detailed enquiries into all cases where possession of land had been acquired by a doubtful title. The principle which was adopted was as follows:

Wherever figures of cultivation for the last 12 years showed that an occupant had cultivated one-third of the holdings he claimed, no inquiry into title was to be made. Inquiries into title were made wherever this condition was not fulfilled, provided the claim of the occupant had not been established by some previous decisions of competent authority. The principle followed involved a great deal of trouble, and the nature of evidence to be collected was often extremely complicated.

In the western section, owing to the existence of old Sanads from His Highness, the Khan of Kalat, it was decided in a note of the conference held on 5th October 1906, between the Hon'ble the Agent to the Governor-General, Revenue Commissioner, and myself that the following principles should be employed. The total irrigable lands were to be divided in three classes. "A" lands already irrigated and cultivated (allowing for fallow years) were to be entered in the names of present occupants, provided they showed reasonable title, e. g., continued possession for 12 years. "B" lands commanded by existing canals or zemindari water-courses therefrom, which are in use but not irrigated owing to scarcity of water, were to be entered in the name of claimants showing the best title, on condition that the Sind Fallow Rules will apply to them from the Kharif Season of 1907; a notice was to be served to such claimants informing them that they would be liable to pay assessment in the fifth year, whether they had cultivated the land or not, provided they had not paid assessment once in the past four years.

"C" land which is entirely waste or 'Pat' was to be entered as Government unoccupied lands.

These principles have been followed in the settlement of the western section. The method employed in the work of settlement is otherwise the same for both sections.

The area of the "C" lands thus entered as Government unoccupied lands extended to about 141,000 acres. The present suit is concerned with all the lands over which the plaintiffs held rights granted by the Khan of Kalat; but the controversy was particularly directed to the "C" lands, the plaintiffs claiming that as they were comprised in their grant from the Khan the Government have no title to them. The answer of the Government is that the Treaty of 1903 gave them full sovereign rights over the territory, that if they decided to ignore

the rights of previous holders and to substitute as owners either themselves or anyone else, no one had a right to complain in a Municipal Court. The acts of the Government in making the treaty and in exercising its powers under it were acts of State for which the Government could not be impleaded. It is necessary, therefore, to refer to the treaty to see what its juristic effect was. According to the plaintiffs, it was merely what their counsel styled "a commercial contract," intended only to effect a more convenient method of collecting revenue, and granting powers only for that object. Their Lordships cannot take this view. It is opposed to the plain wording of the document, and to the obvious construction when the treaty is regarded as a whole. "Cedes in perpetuity the entire management of the Nasirabad Niabat absolutely and with all the rights and privileges, State or personal, as well as full and exclusive revenue, civil and criminal jurisdiction and all other forms of administration" are words creating rights between two sovereign States which were never yet found in any mere commercial agreement. It is true that the right ceded is the entire "management" and the consideration is an annual rent; and as is made clearer in para. 4 of the Treaty, the transaction is in fact a perpetual lease of the territory at a quit rent. Nevertheless, the Sovereign of Kalat made over to the British State the whole of his sovereign rights, though as the cession takes the form of a lease the territory does not pass so as to become part of the British Dominions, but still remains Kalat territory. The Government therefore are entitled to rely, if necessary, upon the provisions of the Foreign Jurisdiction Act, 1890, S. 1.:

It is and shall be lawful for Her Majesty the Queen to hold, exercise, and enjoy any jurisdiction which Her Majesty now has or hereafter may have within a foreign country in the same and as ample a manner as if Her Majesty had acquired that jurisdiction by the cession or conquest of territory.

By s. 16, "In this Act 'foreign country' means any country or place out of His Majesty's dominions. The expression 'jurisdiction' includes power." It is perhaps unnecessary to say that the statute does not increase the powers given to His Majesty in the foreign country. It is the power given and no other which may be exercised as if acquired by conquest or cession. In the present case the powers given are "all the rights and privileges, State or personal." It is plain that these rights and privileges are to be exercised in as ample a manner as if

acquired by conquest or cession. On the legal position that arises in such circumstances there is a wealth of weighty authority. In 7 Moo 1 A 476,¹ the East India Company, who had entered into treaties with the Rajah of Tanjore not dissimilar from the treaty in the present case in 1855, had seized the whole Raj of Tanjore on the death of the last Rajah without leaving issue male. It was held that the East India Company were possessed of sovereign powers; that they had exercised these powers not under colour of law but as acts of State, and that they and their successors could not be impleaded in any Municipal Court for what was so done. In the judgment of the Judicial Committee, delivered by Lord Kingsdown, occur the following words (p. 540):

The result of their Lordships' opinion, is, that the property now claimed by the respondent has been seized by the British Government, acting as a sovereign power, through its delegate the East India Company; and that the act so done, with its consequences, is an act of State over which the supreme Court of Madras has no jurisdiction. Of the propriety or justice of that act neither the Court below nor the Judicial Committee have the means of forming, or the right of expressing, if they had formed, any opinion. It may have been just or unjust, politic or impolitic, beneficial or injurious, taken as a whole, to those whose interests are affected. These are considerations into which their Lordships cannot enter. It is sufficient to state that, even if a wrong has been done, it is a wrong for which no Municipal Court of justice can afford a remedy.

In (1899) A C 572² the plaintiffs claimed to be grantees of concessions made to them by the paramount chief of Pondoland before annexation of Pondoland by the British Government. Lord Halsbury, L. C., in his judgment of the Judicial Committee, said:

It is a well-established principle of law that the transactions of independent States between each other are governed by other laws than those which Municipal Courts administer. It is no answer to say that by ordinary principles of international law private property is respected by the sovereign which accepts the cession and assumes the duties and legal obligations of the former sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well understood rules of international law, a change of sovereignty ought not to affect private property, but no Municipal tribunal has authority to enforce such a delegation.

In 42 I A 229³ the circumstances were that in 1817 Gaekwar had ceded the district of

Ahmedabad to the British Government. In 1898 claims were made by the plaintiffs against the Government asserting permanent rights to lands within the district existing before the cession. The Judicial Committee came to the conclusion that the question entirely depended upon the extent to which the British Government had recognized pre-cession rights:

The relation in which they stood to their native sovereigns before this cession, and the legal rights they enjoyed under them are, save in one respect, entirely irrelevant matters. They could not carry on under the new regime the legal rights, if any, which they might have enjoyed under the old. The only legal enforceable rights they could have against their new sovereign were those, and only those, which that new sovereign, by agreement, express or implied or by legislation, chose to confer upon them (p. 237).

Their Lordships will conclude this review of authorities with the words of Lord Dunedin in giving the judgment of the Board in 51 IA 357⁴ at p. 360. In that case territory in Gwalior had been ceded to the British Government by the Maharajah Scindia by a treaty which expressly provided that each Government should respect the conditions of existing leases. The appellants had brought a suit for a declaration that they were pre-cession proprietors of the lands in question:

A summary of the matter is this: When a territory is acquired by a sovereign state for the first time, that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the Municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay, more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the Municipal Courts. The right to enforce remains only with the high contracting parties.

These decisions were again adopted by the Board in 57 I A 318,⁵ where they were applied to a claim to enforce pre-cession rights in territory leased in perpetuity by H. H. the Nizam to the British Government in 1902. It follows therefore that in this case the Government of India had the right to recognize or not recognize the existing titles to land. In the case of the lands

1. (1857-59) 7 M I A 476 (PO), Secretary of State v. Kamachee Boyce Sahib.

2. (1899) 1899 A C 572 : 68 L J P C 144 : 81 L T 281 : 15 T L R 215, Cook v. Sprigg.

3. ('15) 2 AIR 1915 P C 59 : 30 I O 303 : 39 Bom 625 : 42 I A 229 (PO), Secretary of State v. Bae Rajbai.

4. ('24) 11 AIR 1924 P C 216 : 32 I O 779 : 48 Bom 618 : 51 I A 357 (PO), Vayjesingji v. Secretary of State.

5. ('30) 17 AIR 1930 P C 267 : 128 I O 664 : 58 Cal 570 : 57 I A 318 : 26 N L R 826 (PO), Dattatraya v. Secretary of State.

in suit they decided not to recognize them, and it follows that the plaintiffs have no recourse against the Government in the Municipal Courts. An explanation for Government action was at one time given that the plaintiffs were in breach of their conditions of tenure to the Khan of Kalat. Whether this be true or not is clearly irrelevant in view of the established law regulating the position of the Government as against former proprietors. Neither it nor any action of Government officials indicates any intention on the part of Government to recognize this existing title in these lands. On the contrary, the decision made in October 1906, by the high officials, together with Mr. Smart, that the plaintiffs were only to be given inalienable occupancy rights over some of the lands while the "C" lands were to be entered as Government lands indicates conclusively what the intention of Government was; and it only needed the confirmation of the report by the Government of India, which was signified on 1st April 1908 to conclude the matter. In accordance with these authorities their Lordships have not considered whether the decision was just or unjust, politic or impolitic; and it must not be considered that they have had any material placed before them to indicate that it was, in the circumstances, either unjust or impolitic. Their Lordships will humbly advise His Majesty that this appeal should be allowed and the respondent's suits dismissed with costs. The respondents must pay the costs of this appeal.

G.N./R.K.

*Appeal allowed.*Solicitors for Appellant—*Solicitor, India office.*Solicitors for Respondents—*Hy. S. L. Polak & Co.***(28) A. I. R. 1941 Privy Council 68***(From British Columbia)***24th September 1940**VISCOUNT MAUGHAM, LORDS RUSSELL
OF KILLOWEN, WRIGHT AND PORTER*Canada Rice Mills Ltd. — Appellant*

v.

*Union Marine and General Insurance
Co., Ltd. — Respondent.*

Privy Council Appeal No. 25 of 1939.

(a) Rules of Court of British Columbia, O. 58, R. 4—R. 4 is intended to obviate new trial in cases where such course can properly be avoided—R. 4 applies even to cases tried with jury—Jury finding that there were perils of seas while ship's ventilators were closed—Appellate Court can draw inference of fact that closing of ventilators was due to perils of seas.

Rule 4 gives the Court of Appeal power to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided and applies even in cases tried with a jury. Where the jury have found that there were perils of seas during the period while the ventilators of the ship were closed the appellate Court is entitled to draw an inference of fact that the closing of the ventilators of the ship was caused by the perils of the seas: (1938) 107 L J P C 82, *Disting.*; (1906) A C 148; (1935) A C 346 and 49 S C R 43, *Ref.* [P 71 C 1]

(b) Insurance—Marine—Perils of seas explained—Whether in particular case there is loss due to peril of sea is a question of fact for jury.

Where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner where seawater is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured, there is prima facie a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. It is the fortuitous entry of the seawater which is the peril of the sea in such cases: (1887) 12 A C 503 and (1887) 12 A C 518, *Rel. on.*, (1887) 12 A C 484, *Ref.* [P 72 C 2; P 73 C 1]

Whether in any particular case there is such a loss is a question of fact for the jury. On any voyage a ship may, though she need not necessarily, encounter a storm, but if in consequence of the storm cargo is damaged by the incursion of the sea it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. It cannot be predicated that where damage is caused by a storm even though its incidence or force is not exceptional, a finding of loss by perils may not be justified: (1921) 1 A C 615, *Ref.* [P 73 C 1, 2]

(c) Insurance—Marine—Causa proxima in insurance law does not necessarily mean cause last in time but what is "in substance" cause—Ventilators of ship closed to prevent incursion of sea water—Closing of ventilators causing rice cargo to heat and ferment and thus damaging it—Damage is recoverable as loss by perils of seas—Even otherwise loss falls within general words "all other perils, losses and misfortunes, etc." contained in insurance policy.

Causa proxima in insurance law does not necessarily mean the cause last in time but what is "in substance" the cause, or the cause "to be determined by commonsense principles." [P 73 C 2]

Where the ventilators of a ship during voyage are closed to prevent incursion of sea water and the closing of the ventilators damages the rice cargo by causing it to heat and ferment, the damage is recoverable as a loss by perils of the seas: (1897) L R P 301; (1918) A C 350; (1924) A C 431 and (1868) 3 Ex 71, *Rel. on.* [P 74 C 1]

Even if the damage in such a case is not strictly recoverable as a loss by perils of the seas, it is within the general words "all other perils, losses and misfortunes, etc." contained in the marine insurance policy: (1820) 3 B & Ald 398; (1898) L R P 30 and (1918) A C 101, *Rel. on.*

[P 74 C 1]

Valentine Holmes — for Appellant.

H. Willinck and C. Hillyer — for Respondent.

Lord Wright — The appellants claimed in this action as assured under a floating policy of marine insurance dated 19th December 1929, upon shipments of rice imported by the appellants to their rice mills in British Columbia, as from time to time declared under the policy. The policy covered (among other risks) perils of the seas, and also, under what are often described as the general words, all other perils, losses and misfortunes that have or shall come to the hurt or damage of the subject-matter of the insurance. The goods were warranted free of particular average under 3 per cent. on each package. The seaworthiness of the ship as between the assured and the assurers was admitted. Under this policy the appellants duly declared a full cargo of 50,600 bags of rice weighing 5080 tons shipped on or about 23rd April 1936, in the motor vessel "Segundo" at Rangoon for their dock on the Fraser River. The bags were valued in all at \$191,922. Included in the shipment so declared were 7500 bags of brown rice valued at \$30,798 marked 163 and 102. The shippers were Blackwood Ralli & Co. of Rangoon. The claim is made in respect of the rice declared under these two marks which are compendiously referred to as 163. No claim is made in respect of the other marks shipped, which bore respectively the marks K.G., A.L.Z., and N.L.Z. The respondents issued a certificate of insurance in respect of the whole shipment.

The "Segundo" was a motor vessel of 4414 tons gross and 2668 tons net, registered at Oslo. She had five holds. The bags of the marks 163 and 102 were stowed, partly in No. 2 hold, which was forward of the engine and boiler space and partly in No. 3 hold which was aft of that space. The cargo throughout was well dunnaged and was stowed with adequate air spaces. There were also vertical wooden trunk ventilators and ordinary wooden rice ventilators in each hold. The system of ventilators throughout consisted of cowl ventilators with in addition Samson post ventilators at each hold. These latter were always open, but it was necessary that the cowl ventilators should be also open to ensure a through cur-

rent of air in the holds. There is no complaint of the sufficiency of the ventilation system.

The "Segundo" arrived at Fraser River on 28th May 1936. It was then found that all the rice had heated, but by reason of the franchise of 3 per cent. in the case of particular average and also because the rice in the bags marked 163 and 102 was of finer quality, it was decided that the claim against the respondents as insurers should be limited to these marks.

A primary issue in the action was what was the condition of the rice on shipment, since it was contended that the damaged condition of the rice was not due to perils insured against but to the inherent vice of the goods when shipped. On that issue a commission to take evidence went to Rangoon where a large number of witnesses gave evidence. At the trial which took place in the Supreme Court of British Columbia before the Honourable Robertson J. and a special jury and lasted for seven days, the jury, as will appear later, found that the rice was in good and sound condition when shipped. No complaint has been made of the summing-up. There was abundant evidence to justify the jury's finding on that issue, which was accordingly concluded in the appellants' favour. The question therefore remained whether the appellants had established that the damage was due to perils insured against. The appellants' case was that the damage was due to interference with the ventilation consequent on bad weather during the voyage which caused the closing of the cowl ventilators which it was necessary to keep open to ensure through ventilation. The evidence was that rice is a commodity very liable to heat if not fully ventilated while being carried in the ship's hold. It has a considerable moisture content, and has a capacity of absorbing further moisture. If this moisture is not carried off by ventilation a process of fermentation sets in and damages the grain. The heating thus caused when the ventilation was shut off, would tend to develop even after full ventilation was restored. The ventilators have to be closed when water would get to the cargo if they are not closed. When the ventilators are again opened the cooler air circulating through them also sets up a condensation in the hot, moist and humid atmosphere of the hold, and precipitates moisture on the rice. If a process of fermentation is thus started it may go on for

the rest of the voyage even though the ventilators are not again closed.

In a case of damage to cargo such as the present, the evidence from those in the ship of what happened during the voyage is vital and is generally given by the ship's officers. But in this case, a translation of the ship's log was accepted as the sole evidence from the ship. It is necessarily very brief in its narrative, and might well have called for explanation on many points. But, such as it was, it was put to the jury as the material for their decision of this aspect of the case. They were called upon to make such findings or draw such inferences of fact from the log as seemed to them to be right with the aid of such expert evidence as was laid before them.

The log shows that from 24th April 1936, the day on which the "Segundo" sailed from Rangoon, until 27th April 1936, when she was in the Straits of Malacca, the ventilators were not closed. On that day for some short period the ventilators were covered "on account of unsettled weather," and later in the day they were again covered on account of rain, until the next day. Then for a few hours on the night of 30th April 1936, they were again covered on account of rain and yet again covered on account of heavy showers for a few hours on 1st May 1936. Thereafter there is no entry of any moment until the 8th May 1936.

The learned Judge, in summing up, told the jury that the case of the appellants which was that the damage was caused by the closing of the cowl ventilators and hatches during the voyage, really came down to the question of the period from 8th to 13th May. The 13th it is clear should read as the 11th. Either the Judge made a momentary slip or he was misreported. It is therefore necessary particularly to examine the log entries from 8th to 11th May. The vessel was on 8th driving against heavy head seas, with much pitching. At 19.30 (or 7.30 P. M.) the covers were put on the ventilators owing to rain. On 9th the log records heavy head seas, pitching and spray over decks and hatches and similar entries throughout the day with half a gale or a fresh gale. On 10th there are similar entries, continuous heavy head seas, spray over fore-deck, and later in the day the entry was that she was shipping some seas over the forepart of vessel. About mid-day the wind became a strong gale with hurricane-like squalls at times. The vessel was driving

into a head wind and sea, with pitching and rolling, at times described as tremendous. At 1 A. M. on 11th the covers were removed from the hatches. It is this period in particular, the 9th and 10th May, which the appellants rely on as involving a long continuous interruption of ventilation and as causing the heating and fermentation which was eventually discovered at the end of the voyage. Captain Brown Watson, an expert called on behalf of the respondents, agreed that on the 9th and 10th there was reason for closing the ventilators at least on the forward end to prevent damage to cargo, that is to prevent the cargo getting wet. He did seem disposed to draw a distinction between the forward end and the after end of the ship, but no attempt was made to distinguish different parts of the damaged rice and the jury with the material they had before them were entitled to find, if so minded, that the ventilators were properly closed on 9th and 10th for the safety of the cargo and to reject the distinction between the different holds suggested by Captain Brown Watson. On 15th there is an entry that covers were put on the ventilators owing to humidity or fog, but only for a few hours, and similarly for a few hours on 16th and on 17th. Later on that day, the vessel ran into bad weather, and shipped some spray over the decks, but the wind was a following wind and the ventilators were not closed, except for a brief period on the 18th when there was a heavy sea and a gale, that again was a case of a following sea and gale. On the 25th and 26th, for about 21 hours, the ventilators were closed on account of rain. On the 28th the vessel arrived at Fraser River. It thus appeared that for about 50 odd hours on the 9th and 10th there was a continuous closing of the ventilators and evidence on which the jury might find that it was due to conditions of wind and sea, and that it was the cause of the damage. The closing of the ventilators on account of rain was for brief periods. Rain is not a peril of the sea, but at most a peril on the sea. But there is now no real issue that the damage was due to rain.

At the conclusion of the case after lengthy arguments, the jury were required to give a special verdict on specific questions. Question 3 dealt with the condition of the rice on shipment. It was answered in favour of the appellants as already stated. Questions and answers 6 to 10 should be set out in full:

6. Was the said shipment damaged by heat caused by the closing of the cowl ventilators and

hatches from time to time during the voyage?
Answer: Yes.

7. If the answer to No. 6 is in the affirmative, was the closing of the ventilators and hatches the proximate cause of the damage? Answer: Yes.

8. Was the weather and sea during the time the cowl ventilators and hatches were closed such as to constitute a peril of the sea? Answer: Yes.

9. If the answer to No. 8 is in the affirmative, what were the conditions of the weather and sea? Answer: Heavy winds from 8th to 11th May, with high seas; from 11th to 17th, moderate weather and moderate seas, after which latter date, strong gales and very rough seas up to 20th; variable seas and weather after that date.

10. Did the plaintiff thereby suffer loss exceeding 3 per cent. on each package? Answer: No only on 163.

Some discussion took place both in the Courts of British Columbia and before their Lordships on the form of questions 7 and 8, in particular in regard to the word "proximate" in 7, and in regard to the omission to ask the jury if the peril of the sea was the cause of the closing of the ventilators and hatches. On this latter point, their Lordships would feel justified, if it were necessary, to act upon O. 58, R. 4 of the Rules of the Court of British Columbia. That rule is identical with O. 58, R. 4 of the Rules of the Supreme Court in England which gives the Court of Appeal power (inter alia) to draw inferences of fact and to give any judgment and make any order which ought to have been made and to make such further or other order as the case may require, as well as to receive further evidence. The rule is intended to obviate a new trial in cases where such a course can properly be avoided and applies even in cases tried with a jury. In the present case the jury have found that there were perils of the seas during the period while the ventilators were closed. What is wanting is the finding that there was not merely concurrence in time, but that the perils of the seas caused the closing. The connexion is so obvious that if necessary the Court is entitled to draw an inference of fact that the closing was so caused. Their Lordships were referred to a decision of the Supreme Court of Canada, 49 S O R 48,¹ in which the rule was discussed. The English rule has frequently been discussed in English Courts, for instance in (1906) A C 148,² and (1935) A C 846.³ In the present

case the Court of Appeal in British Columbia regarded themselves as precluded from going beyond a narrow reading of the findings of the jury by a decision of the House of Lords in (1938) 107 L J P C 82,⁴ where Lord Atkin said that the Court cannot itself supply an answer to a missing question. That decision was, however, in an appeal from the Scotch Courts, where there is no rule corresponding to O. 58, R. 4 and where the appellate Court has only the record and verdict before it.

In their Lordships' judgment, the decision in (1938) 107 L J P C 82⁴ cannot in view of O. 58, R. 4 be applied to English or British Columbia appeals. But in truth their Lordships are of opinion that the difficulty can be more simply dealt with. The jury answered the specific questions put to them. Why there was no express question directed to the causal relationship between the closing of ventilation and the perils of the sea is not material. The Judge is responsible for the questions put and the jury have only these questions before them. It may be that all concerned thought the connexion too obvious to call for a special question. No doubt some confusion has been introduced by the form of question 7, was the closing of ventilation the proximate cause of the damage? But if the questions and answers are construed fairly and construed as a whole it is in their Lordships' judgment clear that what was meant by proximate was "last in time." The Judge in summing up directed the jury's special attention by putting question 8 to the fact that the policy insured the plaintiff against damage to the rice arising from perils of the seas. Thus the idea of causal nexus was brought to their minds. Question 9, or perhaps the answer, is somewhat difficult to understand, but the answer at least deals specifically with the crucial period from the 8th to 11th May, describing it as a period of heavy winds and high seas. The period of the voyage up to the 8th is not treated as material and the subsequent part of the voyage may be disregarded.

On these findings, supplemented by further findings as to the amount of damage, the Judge entered judgment for the appellants. The Court of Appeal by a majority set aside that judgment mainly as it seems on grounds of law. There was it was held

1. 49 S O R 48, McPhee v. Esquimaux and Nanaimo Railway Co.

2. (1906) 1906 A C 148 : 75 L J K B 895 : 94 L T 350 : 54 W R 521 : 22 T L R 896, Paquin Ltd. v. Beauclerk.

3. (1935) 1935 A C 846 : 104 L J K B 403 : 153 L T 158, Mechanical and General Inventions Co. v. Austin Motor Co.

4. (1938) 1938 S O (HL) 18 : 107 L J P C 82 : 1938 S O L T 403 : 159 L T 199, McGovern v. James Nimmo & Co.

no evidence of perils of the seas. The conclusion appears to have been based on a view as to the meaning of perils of the seas. It was held however that even if there were perils of the seas, they did not constitute the *causa proxima* for purposes of insurance law, because the *causa proxima* was the deliberate act of the master in closing the ventilation. These points are fully developed in the judgment of Sloan J. A. Martin C. J. in agreeing with the reasons of Sloan J. A. rather emphasised the purely verbal aspect of the jury's finding as to the proximate cause, and thought that so far from finding that the peril of the seas was the proximate cause of the loss, they had come to the conclusion that the loss was due to something else, namely the closing of the ventilators. On this matter their Lordships have already expressed their opinion.

Their Lordships are unable with all respect to agree with the reasoning of Sloan J. A. in his careful opinion, and in the arguments advanced before them in support of it. The two main questions must be discussed separately. The first question, whether on the evidence the jury were justified in finding that there was a peril of the sea depends on the meaning to be attached to those words in a policy of marine insurance. The trial Judge directed the jury that the words referred to fortuitous accident or casualty of the seas but did not include the ordinary action of the wind and wave.

In British Columbia the law of marine insurance is now to be found in the Marine Insurance Act, R. S. B. C., 1936, Ch. 134 which is for all practical purposes the same as the English Marine Insurance Act 1906, which was a codifying Act. Authorities under the latter Act are properly cited as authorities in respect of the former. The Judge in his direction to the jury was quoting Rule 7 in Sch. 1, to the Act. In considering the material questions it is helpful in the first instance to assume that the ventilation was not closed, but that the sea or spray had actually wetted the rice and caused the damage. The other question, that of the *causa proxima*, can then be considered separately. The view of Sloan J. A. seems to be that there was no peril of the sea because in his opinion the weather encountered was normal and such as to be normally expected on a voyage of that character and that there was no weather bad enough to endanger the safety of the ship if the ventilators had not been closed. But these are not the true tests. In the

House of Lords in (1887) 12 A C 503,⁵ which was a bill of lading case but has always been cited as an authority on the meaning of the same words in policies of marine insurance: see per Lord Bramwell in (1887) 12 App. Cas 518⁶ at p. 527. Lord Herschell said at p. 509:

The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen. It was contended that those losses only were losses by perils of the seas which were occasioned by extraordinary violence of the wind or waves. I think this is too narrow a construction of the words and it is not supported by the authorities or by common understanding. It is beyond question that if a vessel strikes upon a rock in fair weather and sinks, this is a loss by perils of the seas.

In (1887) 12 A C 484⁷ at p. 502 Lord Macnaghten said that it was impossible to frame a definition of the words. In (1887) 12 A C 518⁶ where a rat had gnawed a hole in a pipe, whereby seawater entered and damaged the cargo, there was no suggestion that the ship was endangered, but the damage to the cargo of rice was held to be due to a peril of the sea. There are many contingencies which might let the water into the ship besides a storm and in the opinion of Lord Halsbury in the case last cited any accident that should do damage by letting in sea into the vessel should be one of the risks contemplated.

Where there is an accidental incursion of seawater into a vessel at a part of the vessel and in a manner where seawater is not expected to enter in the ordinary course of things and there is consequent damage to the thing insured, there is *prima facie* a loss by perils of the seas. The accident may consist in some negligent act, such as improper opening of a valve, or a hole made in a pipe by mischance, or it may be that seawater is admitted by stress of weather or some like cause bringing the sea over openings ordinarily not exposed to the sea or, even without stress of weather, by the vessel heeling over owing to some accident or by the breaking of hatches or other coverings. These are merely a few amongst many possible instances in which there may be a fortuitous incursion of seawater. It is the

5. (1887) 12 A C 503 : 56 L J Adm 116 : 57 L T 701 : 36 W R 353 : 6 Asp M C 207, Thomas Wilson, Sons & Co v. Overseers of Cargo per the "Xantho".

6. (1887) 12 A C 518 : 57 L J Q B 24 : 57 L T 726 : 36 W R 369 : 52 J P 196 : 6 Asp M C 212, Hamilton, Fraser & Co., v. Pandorf and Co.

7. (1887) 12 A C 484 : 56 L J Q B 626 : 57 L T 695 : 36 W R 337 : 6 Asp M C 200, Thames and Mersey Marine Insurance Co. v. Hamilton, Fraser and Co.

fortuitous entry of the seawater which is the peril of the sea in such cases. Whether in any particular case there is such a loss is a question of fact for the jury. There are many deck openings in a vessel through which the seawater is not expected or intended to enter and, if it enters, only enters by accident or casualty. The cowl ventilators are such openings. If they were not closed at the proper time to prevent seawater coming into the hold and seawater does accidentally come in and do damage, that is just as much an accident of navigation (even though due to negligence, which is immaterial in a contract of insurance) as the improper opening of a valve or other sea connexion. The rush of seawater which but for the covering of the ventilators would have come into them and down to the cargo was in this case due to a storm which was sufficiently out of the ordinary to send seas or spray over the orifices of the ventilators. The jury may have pictured the tramp motor vessel heavily laden with 5000 tons of rice driving into the heavy head seas, pitching and rolling tremendously and swept by seas or spray. Their Lordships do not think that it can properly be said that there was no evidence to justify their finding. On any voyage a ship may, though she need not necessarily encounter a storm, and a storm is a normal incident on such a passage as the "Segundo" was making, but if in consequence of the storm cargo is damaged by the incursion of the sea it would be for the jury to say whether the damage was or was not due to a peril of the sea. They are entitled to take a broad commonsense view of the whole position. How slight a degree of the accident or unexpected will justify a finding of loss by perils of the sea is illustrated by (1921) 1 A C 615,⁸ where a houseboat, the seams of which above the waterline had become defective, was towed in fine weather and in closed water in order to be repaired. A powerful tug was employed and this caused a bow wave so high as to force water up into the defective seams. There was no warranty of seaworthiness. "Sinking by such a wave," said Lord Sumner (p. 630) seems to me a fortuitous casualty; whether forced by passing steamers or between tug and tow, it was beyond the ordinary action of wind and wave, or the ordinary incidents of such towage.

In the same way storms at sea may be frequent, in some cases seasonal, like typhoons in the China Seas; a ship may escape

8. (1921) 1 A C 615 : 90 L J K B 699 : 125 L T 199 : 65 S J 415, *Mountain v. Whittle*.

them and they are outside the ordinary accidents of wind and sea. They may happen on the voyage but it cannot be said that they must happen. In their Lordships' judgment it cannot be predicated that where damage is caused by a storm even though its incidence or force is not exceptional, a finding of loss by perils may not be justified.

There remains the second question whether the damage which was caused not by the incursion of seawater, but by action taken to prevent the incursion is recoverable as a loss by perils of the seas. It is curious that, so far as their Lordships know, there is no express decision on this point under a policy of marine insurance. But in their Lordships' judgment the question should be answered in the affirmative, as they think the jury did. The answer may be based on the view that where the weather conditions so require, the closing of the ventilators is not to be regarded as a separate or independent cause, interposed between the peril of the sea and the damage, but as being such a mere matter of routine seamanship necessitated by the peril that the damage can be regarded as the direct result of the peril. In (1897) P 301⁹ where a cargo of oats and maize had been damaged by the closing of the ventilators owing to heavy weather, it was held that the damage was caused by perils of the sea. The severity of the weather, (there referred to as exceptional, though the adjective is immaterial) was described by Jeune P. as the proximate cause of the damage because the closing of the ventilators was due to that cause, and Gorell Barnes J. described it as the direct cause. It is true that the case dealt with the exceptions in the bill of lading, to which the doctrine of *causa proxima* does not apply in the same way as in insurance law. But it is now established by such authorities as (1918) A C 350¹⁰ and many others that *causa proxima* in insurance law does not necessarily mean the cause last in time but what is "in substance" the cause, per Lord Finlay at p. 355, or the cause "to be determined by commonsense principles," per Lord Dunedin at p. 362. The same rule has been reiterated by the House of Lords several times since then, most strikingly

9. (1897) 1897 L R P 301 : 66 L J P 172 : 77 L T 407 : 46 W R 175 : 8 Asp MC 313, *The Thrumscoo*.

10. (1918) 1918 A C 350 : 87 L J K B 395 : 118 L T 120 : 28 Com Cas 190 : 14 Asp M C 258 : 62 S J 807 : 34 T L R 221, *Leyland v. Norwich Union Fire Insurance Society*.

perhaps in (1924) A C 431,¹¹ where it was held by a majority of the Lords that where a ship insured by the mortgagee was lost by being scuttled by the deliberate act or procurement of the mortgagor, it was not in insurance law to be deemed a loss by perils of the seas. The proximate cause was the intentional and fraudulent act which let in the seawater and sank the vessel. In cases of fire insurance it has been said that loss caused from an apparently necessary and bona fide attempt to put out a fire, by spoiling goods by water, and in other ways, is within the policy: per Kelly C. B. in (1868) 3 Ex 71¹² at p. 74. Their Lordships agree with this expression of opinion and accordingly are prepared to hold that the damage to the rice, which the jury have found to be due to action necessarily and reasonably taken to prevent the peril of the sea affecting the goods, is a loss due to the peril of the sea and is recoverable as such.

The same result may be reached by a somewhat different approach. It may be held that though such a loss is not strictly recoverable as a loss by perils of the seas, it is within the general words "all other perils, losses and misfortunes, etc." which are contained in the policy and have been quoted above. It is true that these general words have to be construed as restricted to cases akin to or resembling or of the same kind as those specially mentioned: per Lord Macnaghten in (1887) 12 A C 484⁷ at p. 501, where they were held not to cover the loss claimed, but subject to that limitation they may be used to give some extension to the specific perils, such as perils of the seas. Thus in (1820) 3 B & ALD 398,¹³ a master of a ship in order to prevent a quantity of dollars falling into the hands of the enemy by whom he was about to be attacked, threw them into the sea and was immediately afterwards captured. It was held that the loss came within the general words of the policy, if it did not fall strictly within the specific words, "jettison" or "enemies." The general words had the effect of "including all losses which are the consequences of justifiable acts done under the certain expectation of capture or destruction by enemies," per Best J. at p. 406. The same principle was applied by Gorell Barnes J.

in (1898) P 30,¹⁴ where a cargo of coal had become so heated that the vessel was compelled to put into a port of refuge and a large portion of the cargo was discharged and sold, entailing a loss of freight. No fire had actually broken out. Gorell Barnes J. held that the loss was recoverable if not as a loss by fire, as a loss ejusdem generis and covered by the general words.

It is obvious that in these two cases there was no question of turning away to avoid a future peril. If there had been, the loss might properly have been held to be due not to the peril but to deliberate action to avoid coming into the area of the peril, as in (1918) A C 101¹⁵ and similar cases. But in (1820) 3 B & ALD 398¹³ and (1898) P 30¹⁴ the subject of the insurance was actually in the grip of the peril: enemies in the one case, fire in the other. The correctness of these authorities has not been doubted and their Lordships think they were rightly decided. Indeed in (1918) A C 101¹⁵ at p. 118 Lord Sumner expressly cites with approval (1898) P 30¹⁴ as a decision on the general words in the policy, and distinguishes it from the case then before him. Similarly, in the present case there was an actually operating peril of the sea. There was accordingly a loss either by perils of the seas or a loss within the general words.

In their Lordships' judgment no ground has been shown for setting aside the verdict of the jury and the appeal should be allowed and the judgment of the Supreme Court restored. The respondents will pay to the appellants their costs of this appeal and in the Courts below. They will humbly so advise His Majesty.

G.N./R.K.

Appeal allowed.

Solicitors for Appellant — *Charles Russell & Co.*
Solicitors for Respondent — *Gard Lyell & Co.*

14. (1898) 1898 L R P 30 : 67 L J P 19 : 78 L T 90 : 14 T L R 191 : 46 W R 396 : 3 Com Cas 62, The Knight of St. Michael.

15. (1918) 1918 A C 101 : 87 L J K B 69 : 117 L T 609 : 23 Com Cas 205 : 14 Asp M C 156 : 62 S J 35 : 34 T L R 36, Becker Gray & Co. v. London Assurance Corporation.

11. (1924) 1924 A C 431 : 93 L J K B 415 : 130 L T 771 : 29 Com Cas 239 : 68 S J 439 : 40 T L R 375 : 18 Ll L Rep 211, Samuel & Co. v. Dumas.

12. (1868) 3 Ex 71 : 37 L J Ex 73 : 17 L T 513 : 16 W R 369, Stanley v. Western Insurance Co.

13. (1820) 3 B & Ald 398 : 22 R R 435, Butler v. Wildman.

(28) A. I. R. 1941 Privy Council 75

(From Canada)

24th September 1940

LORD CHANCELLOR (VISCOUNT SIMON),
VISCOUNT MAUGHAM, LORDS RUSSELL OF
KILLOWEN, WRIGHT AND PORTER

Connors Bros. Ltd. and others —

Appellants

v.

Bernard Connors — Respondent.

Privy Council Appeal No. 54 of 1939.

(a) Practice — Privy Council — Raising of questions by Originating Summons not appropriate — Courts below giving judgment on footing that questions were properly raised — Privy Council in appeal would follow same course and deal with matters on that footing.

Where the raising of certain questions by an Originating Summons was not an appropriate method but the Courts below have delivered their judgments on the footing that the questions were properly raised the Privy Council in appeal will follow the same course and express their opinion on the materials submitted to them on the same footing. [P 76 C 2]

(b) Contract — Covenant in restraint of trade — Onus to prove special circumstances, on whom lies (*Quære*).

In the case of a contract with a covenant in restraint of trade whether the onus to prove special circumstances justifying the covenant lies on the party alleging them. [P 83 C 1]

(c) Contract — Covenant in restraint of trade — Validity — Vendor company carrying on sardine business in Canada transferring same to another company — Covenant restraining vendor from engaging in any sardine business whatsoever in Dominion of Canada held valid and binding on vendor.

B who had established in Canada a business of canning fish of divers kinds including sardines sold his business to *N* who then formed a company. Subsequently *B* with certain others formed a new company which traded in competition with the *N* company and was brought to the verge of bankruptcy. On negotiations from *B*, *N* company purchased from *B* company a controlling interest in the latter company with a covenant that *B* "will not either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada." The question for decision which was raised, though improperly, by an Originating Summons, was whether *B* was precluded from engaging in a sardine business in Canada either by himself or as partner in or as shareholder of an incorporated company carrying on sardine business in Canada :

Held that (1) a small holding of shares in a company carrying on a sardine business in Canada, perhaps only as a part of its undertaking, would not be covered by the words "engage in" a sardine business. On the other hand *B* might well be held to be engaging in such a business if he held a controlling interest in a company formed to carry on a sardine business. But it could not safely be de-

clared that a shareholding in a company carrying on such business was necessarily a breach of the covenant ; [P 80 C 2]

(2) the phrase "directly or indirectly engage in the sardine business" in the covenant was not void for uncertainty; [P 80 C 2]

(3) the business of *B* company was carried on in each of the provinces of Canada and the covenant so far as space was concerned that is in so far as it extended to the Dominion of Canada was not unreasonable. The question of reasonableness being a matter of law for the Court it was not necessary in relation to the trade of a large manufacturer or merchant to prove to the satisfaction of the Court that the business which the covenant was designed to protect had been carried on in every part of the area mentioned in the covenant : (1894) A C 535 and (1916) 1 A C 688, *Rel. on*. [P 84 C 1,2]

The restriction as to space being reasonable it could not be held to be unreasonable because there was no limit as to time : (1921) 2 A C 158, *Rel. on* ; [P 84 C 2]

(4) the restraint was not injurious to the public in the sense that the restriction was calculated to produce a pernicious monopoly, that is to say a monopoly calculated to enhance prices to an unreasonable extent since every other person in Canada could set up such a business : (1893) 1 Ch 680 and (1913) A C 781, *Approved*. [P 84 C 2]

The onus of establishing that the restraint was injurious to the public was on the party who attacked the covenant. [P 84 C 2]

When the Court was satisfied that the restraint was reasonable as between the parties it must always be very difficult to prove in a case connected with goodwill that public interest was affected : (1916) 1 A C 688, *Approved*. [P 84 C 2]

(5) the principles as to a covenant being in restraint of trade applicable in the case of a sale of good will were also applicable with necessary modifications to a case in which the goodwill sold was the property of a limited company or where, instead of selling the undertaking, the shares or stock of the company or a large interest therein was being sold and one or more of the directors or managers of the company being interested in the sale were willing, in order to enable the transaction to go through or to obtain a better price, to enter into restrictive covenants with the purchaser. [P 81 C 2; P 82 C 1]

The covenant by *B* with *N* restraining *B* from engaging in any sardine business whatsoever in the Dominion of Canada was binding on *B* as being a reasonable protection of the shares purchased by *N* company in *B* company: (1913) A C 781; ('34) 21 A I R 1934 P O 101 and (1894) A C 535, *Approved*. [P 85 C 1]

F. Gahan — for Appellants.

Respondent Ex parte.

Viscount Maugham. — This is an appeal from a judgment of the Supreme Court of Canada dated 19th December 1938, which (by a majority of three Judges to two) reversed the judgment of the supreme Court of New Brunswick, appellate division. The latter had dismissed an appeal from a judgment of Chief Justice of New Brunswick.

The divergence of judicial opinion is striking, since six Judges in Canada were in favour of the present appellants and three—the majority in the Supreme Court of Canada—took the other view. These differences have perhaps been accentuated by the curious shape which the proceedings assumed. The main question has throughout been whether certain covenants entered into by Bernard Connors, the present respondent, with the appellants or any of those covenants are enforceable or whether on the other hand they are unenforceable as being in restraint of trade. This question has been raised not in proceedings instituted by the covenantor to enforce some or one of the covenants, but by an Originating Summons issued under O. 54A of the Rules of the Supreme Court of New Brunswick by the covenantor (the respondent) seeking to have it determined whether upon the construction of the covenants he was barred from engaging in a certain business or from doing certain other acts. These questions were not in the main matters for construction at all, though incidentally some matters of construction might have arisen for the consideration of the Court. They were questions of law based on public policy depending to a large extent no doubt on the circumstances proved to exist at the time when the covenants were entered into.

It is to be noted that the Chief Justice of New Brunswick seems to have entertained grave doubts as to the propriety of such a proceeding under O. 54A. To their Lordships it seems clear that those doubts were more than justified. In the event the case proceeded without the advantage of pleadings or particulars or discovery of documents. The respondent made a concise affidavit in support of his summons in which he stated no facts or circumstances relating to the covenants beyond the statement that he was advised that they were not reasonably necessary for the protection of the appellants in their business and were in the nature of an effort to stifle or prevent lawful competition. At the trial he was cross-examined on his affidavit and no further evidence was called on his behalf. The appellants then called three witnesses. In these circumstances it is not surprising that the evidence before the Court was not of a very satisfactory character, and that differing opinions as to its result have been formed by the Judges in Canada who have had to deal with the matter. Their Lordships have thus to deal with an appeal on questions raised under

O. 54A, New Brunswick Judicature Act, which was not in their view an appropriate method of dealing with those questions; but, having regard to the fact that three Courts have delivered their judgments on the footing that the questions were properly raised before them, their Lordships feel bound to follow the same course and to express their opinion on the materials submitted to them. It should be added that the respondent did not lodge his case in the usual way and was not represented on the present appeal. Their Lordships naturally regret this circumstance which adds to their difficulties; but they think it right to state that counsel for the appellants argued on their behalf with great candour and fairness, and they do not think that the respondent has suffered by reason of the absence of counsel on his behalf.

In or about the year 1890 the respondent's father and uncle Lewis and Patrick Connors established a business of canning fish of divers kinds including fish called sardines, in the Passamoquoddy area on the Bay of Fundy. It is not in dispute that this is the only area in Canada where it is commercially practicable to pack sardines, though there are a number of sardine packers in the State of Maine on the other side of Passamoquoddy Bay. The business was a successful one, and it was transferred to a company (which may be called "the old company") in which Lewis Connors, Patrick Connors and the respondent were shareholders. There were then two factories and the respondent was the superintendent of one of them. In the year 1923 the business then having become a very large one, the shareholders sold all their shares to A. Neil McLean and three associates for \$400,000 payable as to \$200,000 in cash and as to \$200,000 in preferred stock of Connors Bros., Ltd. (one of the appellants) a company which, having been formed for that purpose, took over the assets of the old company. The respondent received \$16,667 for his shares in the old company. Connors Bros., Ltd., after acquiring the assets and goodwill of the old company registered the name "Connors" as a trade mark to be used in connexion with the sale of fish and fish products, and a little later registered as a trade mark the words "Connors Famous Sea Food." Patrick Connors entered into a contract to act as general manager of Connors Bros., Ltd. for a period of five years at a salary of \$10,000 per annum. The respondent was offered a position in the company but declined it. No restrictive

covenant was entered into by the respondent with Connors Bros., Ltd. at this time.

Connors Bros., Ltd., were shortly afterwards faced with very severe competition throughout Canada and in the other countries in which they sold their products from a new business carried on by Lewis Connors, the respondent and another member of the family. This business was incorporated in 1924 under the name of "Lewis Connors and Sons, Ltd." (the second appellants). The capital issued amounted to \$150,000 divided into \$50,000 preferred and \$100,000 common stock, of which the respondent received a considerable amount from his father Lewis Connors. The competition with Connors Bros., Ltd., as the trial Judge found, was carried on by means not at all creditable to the respondent and his father. They canvassed for orders the old customers of the business representing themselves to be "the original Connors." They adopted brands and letter-paper headings similar to those of Connors Bros. They were selling, according to the finding of the trial Judge, in all the provinces of Canada and in nearly every country in which Connors Bros. had sold sardines. The respondent in cross-examination said: "I imagine we said we were the original and wanted to get the business." In this endeavour they had cut prices to such an extent that they had been carrying on business at a loss. By 1925 they had reached a very unsatisfactory financial condition which could not long continue. It was in these circumstances that Lewis Connors, plainly with the knowledge of the respondent (his son) who was a manager of the company, approached the directors of Connors Bros., Ltd., with a view to a settlement. Ultimately an agreement dated 30th April 1925, which may be described as "the option agreement," was entered into between Lewis Connors and the respondent of the first part and Neil McLean and Allan McLean of the second part. The two companies were not parties; but they were under the control of those four stock-holders who joined in the agreement. The covenants restricting trade which they all entered into are not those which the appellants could rely upon (since they were not parties), but the agreement shows very clearly the circumstances under which the covenant by the respondent now in question was entered into a few weeks later and the true nature of the transaction.

The substance of the option agreement was as follows: The McLeans were to buy from Lewis Connors and the respondent

\$25,000 preferred and \$52,500 common stock of Lewis Connors & Sons, Ltd., and were to give in payment \$25,000 preferred and \$30,000 common stock of Connors Bros., Ltd. It is plain that the transaction would give the latter company a controlling interest in Lewis Connors Ltd. With reference to the remaining capital stock of Lewis Connors Ltd., (\$47,500 common and \$25,000 preferred stock) the McLeans undertook to procure a contract to be executed by Connors Bros., Ltd., with the stockholders of Lewis Connors & Sons Ltd., providing that Connors Bros., Ltd., would at any time within five years from 1st January 1926, and on demand from any of the stockholders of Lewis Connors & Sons, Ltd., who at the time of such demand held any part of the remaining outstanding issued capital stock of the said Lewis Connors, Ltd., purchase the holdings of such stockholders so making such demand on the basis of \$35,000 cash for \$72,500 capital stock.

It was further provided: (Clause 3) that the McLeans would procure a contract by Connors Bros. to pay Lewis Connors a salary of \$1500 a year for five years for his services to Lewis Connors & Sons, Ltd., and a similar sum by way of salary from Connors Bros., for nominal services. (Clause 4) That the McLeans would cause Connors Bros. to relieve Lewis and the respondent of a personal liability at the Bank of Nova Scotia. (Clause 5) That Lewis Connors and the respondent should be continued as directors of Lewis Connors & Sons, Ltd., until they exercised their option to sell their stock in that company to Connors Bros., Ltd., and their stock was fully paid for. (Clause 11) That the McLeans would procure that Lewis Connors & Sons, Ltd., should employ the respondent as manager for five years at a salary of \$5000, with the prospect of its being \$7500, the contract to be guaranteed by Connors Bros., Ltd. The agreement contemplated that Lewis Connors & Sons, Ltd., would continue to carry on business and express provision was made as to the manner in which that was to be done. Clause 9 was in these terms:

All parties hereto agree to work together for the benefit of the stockholders of Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., and will not, either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands of either Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere, nor, for a period of ten years from the date hereof, use the name of Connors in connexion with sardine business in any country whatsoever.

The agreement was stated to be conditional on its acceptance and ratification by Connors Bros., Ltd., and to constitute an option given by the parties of the first part to the parties of the second part, which option should expire on 30th May 1925, unless the parties of the second part should give notice in writing of its acceptance. The option was duly exercised and it was ultimately carried into effect by transfers of stock as agreed, which however were not produced in evidence. It was perceived that the control of Connors Bros., Ltd., was not adequately provided for, and a Voting Trust Agreement was entered into on 23rd May 1925, between Bernard Connors of the first part, the McLeans of the second part and the Eastern Trust Company of the third part. It recites that the parties of the first and second parts were shareholders in Connors Bros., Ltd., and had agreed to transfer 360 shares of the capital stock of that company to the trustee to the intent "that the stock should be voted in one block by A. Neil McLean after consultation" with the other parties to the agreement. The agreement was expressed to be on the condition that McLean would vote the stock under proxy to him in support of the carrying out of the agreement between Lewis Connors and Bernard Connors and the McLeans bearing date 30th April 1925; and also that if Patrick W. Connors should cease to manage the sardine factory of Connors Bros., Ltd., that the McLeans would give their support to obtaining the position for Bernard Connors at a salary of at least \$7,500.00 per year and also that the said Neil McLean would "vote the stock in favour of continuing the operation of the factory of Lewis Connors & Sons, Ltd., so long as the same is being operated at a profit" and would also vote in favour of Lewis Connors and Bernard Connors as directors of Connors Bros., Ltd.

Two agreements in June 1925 further carried into effect the option agreement. One was dated 9th June 1925, and was made between Connors Bros., Ltd., of the first part and Lewis and Bernard Connors of the second part. This recites that there was then issued an outstanding \$100,000.00 par value common stock and \$50,000.00 par value preferred stock of Lewis Connors & Sons, Ltd., and by contract of 30th April 1925, that Lewis and Bernard Connors had agreed to sell to the McLeans \$25,000.00 par value preferred stock and \$52,500.00 par value common stock of Lewis Connors & Sons, Ltd. The agreement witnessed that with refer-

ence to the remaining outstanding issued common stock of Lewis Connors & Sons, Ltd., Connors Bros., Ltd., would at any time within five years from 1st January 1926, and on demand from any then stockholder of Lewis Connors & Sons, Ltd., purchase the holdings of such stockholder on the option mentioned in the previous agreement. Paragraph 4 is as follows:

The said Lewis Connors and Bernard Connors agree with the said Connors Bros., Ltd., that they will not, either directly or indirectly, engage in any other sardine business whatsoever in the Dominion of Canada nor directly or indirectly use the brands either of Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere nor for a period of ten years from 30th April A.D. 1925, use the name of Connors in connexion with the sardine business in any country whatsoever.

This is the important covenant in the present appeal. The date mentioned in it was the date of the option agreement. The other agreement, which was of even date, was made between Bernard Connors of the first part, Lewis Connors & Sons, Ltd., of the second part, and Connors Bros., Ltd., of the third part by which the plaintiff agreed to work for Lewis Connors & Sons, Ltd., under direction of a board of directors in the capacity of manager of the company's sardine factory in the City of Saint John for a period of five years and Lewis Connors & Sons, Ltd., agreed to employ him for the term mentioned at \$5,000.00 per year. Connors Bros., Ltd., guaranteed the payment of this salary. Provision was also made in accordance with the option agreement for his salary being raised to \$7,500.00 if he became manager of two factories in operation at the same time. The respondent commenced his duties as manager of the factory in West St. John and when the business was transferred to Black's Harbour, he went there; but he was not satisfied. Disputes had arisen between the respondent and the two companies and finally by an agreement of 2nd October 1926, between the respondent, of the first part, Lewis Connors & Sons, Ltd., of the second part, Connors Bros., Ltd., of the third part, and the two McLeans, of the fourth part, the respondent sold his remaining 172 shares of the capital stock of Lewis Connors and Sons, Ltd., to Connors Bros., Ltd., for \$11,416, and his employment agreement was ended by mutual consent. By cl. 3 it was provided as follows:

The party of the first part also agrees with the said parties of the second and third parts that he will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada or directly or indirectly use the brands of

either Connors Bros., Ltd., or Lewis Connors & Sons, Ltd., in the Dominion of Canada or elsewhere, nor for a period of ten years from the 30th day of April A.D. 1925, use the name of Connors in connexion with sardine business in any country whatsoever.

The date from which the period was to run was, it will be noticed, the same date as that mentioned in the agreement of 9th June 1925. Clause 5 was as follows:

The parties of the second, third and fourth parts hereby release the said party of the first part (Bernard Connors) from all claims and demands of every nature and description which they or either of them have or which hereafter they or either of them may have against the party of the first part by reason of anything to the date of these presents including but without limiting the generality of the foregoing any claims by reason of any shortage in inventory alleged misrepresentation or for alleged improper conduct of the party of the first part in connexion with the business of the said Lewis Connors & Sons, Ltd., or the purchase of an interest therein or stock thereof.

It will be convenient to mention here that in the opinion of their Lordships the option agreement and the two agreements of 9th June 1925 have, for the present purpose, to be read together as constituting the transaction which has to be considered in deciding whether the covenant by the respondent with Connors Bros, Ltd., contained in the first agreement of 9th June 1925 is or is not enforceable. As was observed in the judgment of Kerwin J., it is clear that it was not intended by the agreement of 2nd October 1926 to release the respondent from that covenant since, apart from the words "by reason of anything to the date of these presents," which are sufficient to safeguard the future rights of the covenantees, the covenant was re-inserted, with the same date from which the last part of the covenant was to run, which was contained in the previous covenant. The position therefore in effect was this. The respondent and his father Lewis Connors being in a position to sell a controlling interest in Lewis Connors & Sons, Ltd., and being the managers of the business of that company sold that controlling interest to Connors Bros., Ltd., or to the McLeans who were the managers of Connors Bros., Ltd., and the principal stockholders in it. Lewis and Bernard Connors and their associates obtained a large stock-holding interest in Connors Bros., Ltd., and they and other stock-holders in Lewis Connors & Sons Ltd., were to be entitled to sell their remaining holdings to Connors Bros., Ltd., at a price which was proved to be above the market values, and until sale were to continue to act as directors of Lewis Connors & Sons

Ltd. Bernard Connors was given a position as manager at a salary for a period of five years. The two McLeans and the two Connors agreed "to work for the benefit of the stock-holders of the two companies." The respondent and Lewis Connors entered into the restrictive covenant with Connors Bros., Ltd., above set out. The precise terms of it will be considered later. Having regard to the previous history as above stated, and to the fact that the name of Connors could be used by Lewis Connors and the respondent, if they were left to compete in the sardine business with Lewis Connors & Sons, Ltd., it can hardly be doubted that this covenant was an essential feature of the transaction, and that if it had not been entered into the McLeans and Connors Bros., Ltd., would have refused to enter into this business arrangement. The cut-throat competition would then have continued in all probability until Lewis Connors & Sons Ltd., had been driven into liquidation.

Lewis Connors died in 1934; and the period of ten years from 30th April 1925, mentioned in the three covenants expired a year later. The respondent in the meantime had been carrying on a fish business under name of the "The B. Connors Fish Company." It dealt with a number of products but not with sardines. Lewis Connors & Sons Ltd., continued to carry on its business, of which the packing and selling of sardines was much the more important part. Connors Bros., Ltd., continued to carry on its similar business. In the year 1936 the total sales of the two companies exceeded one and a half million dollars.

In the following year the respondent wrote to Connors Bros., Ltd., stating that he did not consider himself bound by the provisions of the covenants since they were in restraint of trade, and he stated that he desired to engage in and work at the sardine business in Canada and elsewhere, and that he also desired to use the name of Connors, if he so chose, in connexion with the sardine business in Canada and elsewhere. He went on to explain that he desired to ascertain his legal position before making plans for or investing capital in such a business. He received a reply from the solicitors of Connors Bros., Ltd., and Lewis Connors, Ltd., to the effect that their clients considered the provisions binding and had no intention of abandoning their rights. The respondent commenced these proceedings by Originating Summons on 27th April 1937, and

propounded the following questions for the determination of the Court :

(a) Whether, upon construction of the provision written variously in the said agreements as "will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada" and "will not directly or indirectly engage in any sardine business whatsoever in the Dominion of Canada," the said Bernard Connors the covenantor mentioned in both agreements, is at the present time and shall be thenceforward barred from engaging in the sardine business in Canada as owner by himself or in partnership with others of such a business or as a shareholder of an incorporated company engaged in such business in Canada.

(b) Whether, upon construction of the words "will not directly or indirectly engage in" used in said covenants the said Bernard Connors is barred at law from working at the sardine business in Canada as an employee of any person, persons firm or corporations engaged in the sardine business in Canada.

(c) Whether, upon construction of the said covenants and particularly the following words contained therein "nor for a period of ten years from 30th day of April, A. D. 1925, use the name of Connors in connexion with the sardine business in any country whatsoever," the said Bernard Connors may at this time and thenceforward lawfully use the name of "Connors" in connexion with the sardine business of Canada.

The Chief Justice of New Brunswick, by his judgment, determined that question (a) should be answered in the affirmative and question (c) in the negative. He declined in the exercise of his discretion, to answer question (b), for reasons which he stated which appear to their Lordships to be entirely satisfactory. The learned Judges of the appeal division affirmed his order on all three points. In the Supreme Court of Canada the appeal was allowed by a majority, and it was declared that the covenant in question "in so far as it prohibits the appellant" (the present respondent) "from engaging directly or indirectly in any sardine business whatsoever in the Dominion of Canada" was unenforceable. It will be convenient here to restate the covenant of 9th June 1925, dividing the material portion into three parts for the purpose of appreciating the position :

The said Lewis Connors and Bernard Connors agree with the said Connors Bros., Ltd. that : (1) they will not directly or indirectly engage in any other sardine business whatsoever in the Dominion of Canada ; (2) nor directly or indirectly use the brands of either Connors Bros., Ltd. or Lewis Connors and Sons, Ltd., in the Dominion of Canada or elsewhere ; (3) nor for a period of ten years from 30th day of April, 1925, use the name of Connors in connexion with the sardine business in any country whatsoever.

In the opinion of their Lordships these three parts of the covenant relate to widely different matters and are clearly severable.

The first part is *prima facie* in restraint of trade in the ordinary sense. The second part appears to restrain a fraudulent or dishonest use of brands belonging to the covenantees. No question seems to be asked in relation to it. The third part, unlike the other two, is limited in time but unrestricted in space and relates to the use by the respondent of his name in connexion with the sardine business. Difficult questions might have arisen in relation to this part of the covenant, but the ten years had expired before the summons was issued, and it seems to their Lordships that question (c) in view of that fact did not call for a judicial answer, since it had ceased to be of practical importance.

There remains question (a) which relates to the first part of the covenant. The question is whether the respondent is barred from engaging in the sardine business in Canada (1) as owner by himself or (2) in partnership with others or (3) as a shareholder of an incorporated company engaged in such a business in Canada. But the relevant words of the covenant are "will not directly or indirectly engage in any other sardine business, etc.," and the holding of shares is not mentioned. This is another illustration of the inconvenience which attends the answering of theoretical questions in a case of this kind. It appears clear that a small holding of shares in a company carrying on a sardine business in Canada, perhaps only as a part of its undertaking, would not be covered by the words "engage in" a sardine business. On the other hand a man might well be held to be engaging in such a business if he held a controlling interest in a company formed to carry on a sardine business. Much would depend on the particular circumstances of the case. It seems to their Lordships that it would be wrong to answer question (a) as it stands in the affirmative without qualification, for whatever view may be taken as to the covenant not to engage in a sardine business in Canada, it cannot safely be declared that a shareholding in a company carrying on such business is necessarily a breach of the covenant. Their Lordships are accordingly left with the question whether the first two parts of the covenant preclude the respondent from engaging in such a business in Canada as owner or partner, or whether it is not enforceable.

In the view of their Lordships the phrase "directly or indirectly engage in the sardine business" is not void for uncertainty. Such

words found in like covenants have not infrequently been enforced in this country. It may be difficult to assign by way of definition exact limits to their operation, and in some cases it may not be easy to draw the line. The same observation might be made as to such well-known words as for example "negligence" or "nuisance." In actual practice, however, and in concrete cases where all the circumstances have been placed before the Court it is seldom that any difficulty is experienced in determining whether the alleged breach is or is not within the meaning of such a covenant. The covenant is alleged to be one which the Courts should not enforce because it was in restraint of trade and, therefore, contrary to public policy. There have been many statements of the general rule during the last thirty years, and their Lordships do not propose to add to their number, for every alteration of language is apt to be treated as if some slight difference in the rule or in its application were intended. The principles now well-established cannot be better stated than in the often-quoted passage from the judgment of the Board delivered by Lord Parker in (1913) A C 731¹ at p. 795 :

Though, speaking generally, it is the interest of every individual member of the community that he should be free to earn his livelihood in any lawful manner, and the interest of the community that every individual should have this freedom, yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. The existing law on the point is laid down in (1894) A C 535.² For a contract in restraint of trade to be enforceable in a Court of law or equity, the restraint, whether it be partial or general restraint, must (to use the language of Lord Macnaghten, evidently adapted from that of Tindal C. J., in (1891) 7 Bing 735³) be reasonable both in reference to the interests of the contracting parties and in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public. Their Lordships are not aware of any case in which a restraint though reasonable in the interests of the parties has been held unenforceable because it involved some injury to the public.

It should be observed that in this statement there is no attempt to limit or define

1. (1913) 1913 A C 731 : 83 L J P C 84 : 109 L T 258 : 12 Asp M C 861 : 29 T L R 743, Attorney-General of Australia v. Adelaide Steamship Co.
2. (1894) 1894 A C 535 : 63 L J Ch 908 : 11 R 1 : 71 L T 489, Nordenfellt v. Maxim Nordenfellt Co. Ltd.
3. (1891) 7 Bing 735 : 5 M & P 768 : 9 L J (O S) C P 192, Horner v. Graves.

. 1941 K/11 & 12

the cases in which the community is "equally interested in maintaining freedom of contract within reasonable limits." The same remark is true as regards the proposition stated by Lord Macmillan in delivering the judgment of the Board in (1934) A C 181⁴ at p. 189 :

The law does not condemn every covenant which is in restraint of trade, for it recognizes, that in certain cases it may be legitimate, and indeed beneficial, that a person should limit his future commercial activities, as, for example, where he would be unable to obtain a good price on the sale of his business unless he came under an obligation not to compete with the purchaser.

The cases which have most often come before the Courts have been those connected with the sale of a goodwill and those of master and servant; and the wide differences between these two categories from the point of view of restraint of trade have repeatedly been pointed out. (See (1913) A C 724⁵ at pp. 731, 738; (1916) 1 A C 688⁶ at pp. 701, 708, 709. Reference may also be made to an excellent passage in Edn. 18 of Anson's Law of Contract, pp. 236, 7.)

Their Lordships are not here concerned to deal with cases in the second category. With regard to those in the first it is plain that considerations which apply in such cases will often be applicable with necessary modifications to a case in which the goodwill sold is the property of a limited company. A covenant by such a company not to compete with the purchaser would in general be useless as a protection, for the company would in due course be wound up, and the most serious competition might be expected to come from those who had been actively engaged in managing and carrying on its affairs. The necessary capital might be supplied out of the price paid by the purchaser.

To take a simple case, if the managing director of a private company, owning all or the great majority of its shares desires to effect a sale by the company of the whole undertaking and is willing in order that a better price may be obtained to enter into a reasonable covenant restrictive of his activities as regards carrying on such a business

4. ('34) 21 A I R 1934 P C 101 : 150 I C 292 : 1934 A C 181 : 103 L J P C 58 : 150 L T 503 : 78 S J 173 : 50 T L R 253, Vancouver Malt and Sake Brewing Ltd. v. Vancouver Breweries Ltd.
5. (1913) 1913 A C 724 : 82 L J K B 1153 : 109 L T 449 : 57 S J 739 : 29 T L R 727, Mason v. Provident Clothing and Supply Co. Ltd.
6. (1916) 1 A C 688 : 85 L J Ch 210 : 114 L T 618 : 60 S J 305 : 82 T L R 297, Morris (Herbert) Ltd. v. Saxelby.

in the future, it is difficult to see why public policy should intervene. For though public policy requires that trading should be encouraged and that trade should as far as possible be free, on the other hand there would be a restriction on this freedom if the person in control of a company owning a business was not able to enter into such a contract as would enable him to obtain the full benefit of the proposed sale. As Lord Watson observed in (1894) A C 535² at p. 552:

It is now generally conceded that "it is to the advantage of the public to allow a trader who has established a lucrative business to dispose of it to a successor by whom it may be efficiently carried on. . . . Accordingly it has been determined judicially, that in cases where the purchaser, for his own protection, obtains an obligation restraining the seller from competing with him, within bounds which having regard to the nature of the business are reasonable and are limited in respect of space, the obligation is not obnoxious to public policy, and is therefore capable of being enforced.

That this principle is applicable even in the case of an important public company where the covenant is entered into by a managing director holding shares in the company is evident from the facts of the case from which that passage is taken; for Lord Herschell (at p. 541), Lord Watson (at p. 551), Lord Ashbourne (at p. 555) and Lord Macnaghten (at p. 560) found no difficulty in holding that the case must be treated on precisely the same footing as if the covenant had been entered into by Mr. Nordenfelt in connexion with the direct sale of the goodwill of his business.

This being accepted in the case of the sale of the business of a company and of a covenant entered into upon such a sale by a person who does not own the goodwill or any other assets of the company (which was the case of Mr. Nordenfelt) the same result may well follow in a case where, instead of selling the undertaking, the shares or stock of the company or a large interest therein is being sold and one or more of the directors or managers of the company being interested in the sale are willing, in order to enable the transaction to go through or to obtain a better price, to enter into restrictive covenants with the purchaser. Every such case must depend on the surrounding facts and circumstances, and their Lordships do not propose to lay down a general rule, but there are many cases of that character in which as it seems to them the principles above referred to will apply, where in other words the community is as interested in maintaining freedom of contract within reasonable limits as it is in maintaining

freedom of trade: see (1913) A C 781¹ at p. 795. On the whole and with the greatest respect to the Chief Justice of Canada their Lordships are of opinion that this case for the present purpose must be treated as governed by the same principle as that which would have applied if the respondent had himself been selling the goodwill of the business of Lewis Connors & Sons, Ltd. Nor can they accept the view that the real purpose of the transaction was to obtain a monopoly in the business of Canadian sardines. They see no sufficient ground for differing from the view which must apparently have been held by all the other Judges in Canada that the McLeans, the controlling shareholders in Connors Bros., Ltd., taught by an unhappy experience in the past, were seeking to obtain covenants from the two Connors who had been controlling and managing the business of Lewis Connors & Sons, Ltd., which would prevent those persons from gravely depreciating the value of the large stockholdings in that company which were being purchased at a full price.

There remain two questions. The first is whether the covenant was reasonably necessary for the protection of the goodwill of the business of Lewis Connors & Sons, Ltd., for if the restraint was larger than was necessary for that protection it could be of no benefit to either party and would be regarded in the eye of the law as oppressive and therefore unenforceable. The second is whether the covenant is "consistent with the interests of the public." 1919 A C 548⁷ at page 562.

In the opinion of the Chief Justice of Canada and Davis and Hudson JJ. the former question was the main question in the case and they agreed in answering that the restraint was not reasonable as between the parties. The Chief Justice of New Brunswick, the Judges of the appeal division and Kerwin & Crocket JJ. in the Supreme Court of Canada took the other view. The majority in that Court may perhaps have placed too heavy an onus on the appellants. Lord Parker in (1916) A C 688⁶ at p. 706 remarked as follows:

It is not that such restraints (on trade) must of themselves operate to the public injury, but that it is against the policy of the common law to enforce them except in cases where there are special circumstances to justify them. The onus of prov-

7. (1919) 1919 A C 548 : 120 L T 613: 88 L J P C 59 : 35 T L R 354, *McEllistrim v. Ballymacelligott Co-operative Agricultural and Dairy Society Ltd.*

ing such special circumstances must, of course, rest on the party alleging them. When once they are proved, it is a question of law for the decision of the judge whether they do or do not justify the restraint. There is no question of onus one way or the other.

Lord Parker in this part of his speech was stating the effect of Lord Macnaghten's judgment in (1894) A C 535.² If however that judgment be referred to, it will be seen that Lord Macnaghten in citing Lord Langdale's decision in (1843) 3 Beav 383⁸ said distinctly that on the facts of that case it lay on the defendant to prove that the area of restriction was unreasonable : (1894) A C 535² at p. 573. This indeed was only following the opinion expressed by the Court of Queen's Bench in the important case in (1853) 1 EL & BL 391⁹ at p. 412 in an action relating to a covenant by a retiring partner, and in a number of other cases of which (1880) 14 Ch D 351¹⁰ at p. 365 is one example. It is possible that in a case where a goodwill is being sold by a covenantor the rule as to onus of proof of special circumstances may require further elucidation. The persons who have actively been concerned in the management of a business have sometimes had a knowledge of its trade secrets and have often become acquainted with its trade connexion. In such cases it may be *prima facie* reasonable that the purchasers should insist on a covenant or covenants which will enable them to obtain the full benefit of the goodwill which they are purchasing, and if a company happens to be the owner it is only from individuals that useful covenants can be obtained: see *Smith's Leading Cases* 13th Edn. Vol. I at p. 481.

Their Lordships however are referring to this matter of onus only to show that they regard it as one worthy of consideration on some future occasion, and they propose to deal with the present case as if the covenantee was called upon to prove all the special circumstances.

The unusual way in which the question was raised before the Court must be remembered. The respondent was the first witness called and in cross-examination he said with regard to the old company whose business was acquired by Connors Bros., Ltd., that he thought that company was carrying on business in every province in Canada.

8. (1843) 3 Beav 383 : 52 R R 162, *Whittaker v. Howe*.

9. (1853) 1 EL & BL 391 : 22 L J Q B 185 : 17 Jur 1149 : 93 R R 197, *Tallis v. Tallis*.

10. (1880) 14 Ch D 351 : 49 L J Ch 388 : 42 L T 679 : 28 W R 628 : 44 J P 668, *Rousillon v. Rousillon*.

Asked as to the business of Lewis Connors & Sons, Ltd., he said in cross-examination "I think perhaps they were selling some (meaning, as the context shows, cases of sardines) in pretty near every province in Canada." Neil McLean whose evidence was plainly accepted by the trial Judge gave evidence as to the businesses of Connors Bros., Ltd., and Lewis Connors & Sons, Ltd., while they were engaged in severe competition everywhere, but it was never suggested to him in cross-examination that the business of either company did not extend over all Canada. In truth counsel for the respondent was not endeavouring to establish such a proposition. A clerk in charge of the export department (J. J. Hayes Doone) proved that when the old company sold its business to Connors Bros., Ltd., they were selling in all provinces in Canada as well as elsewhere, and it was assumed that Lewis Connors & Sons, Ltd., competed with Connors Bros., Ltd., throughout Canada. Burton M. Hill a director of Connors Bros., Ltd., gave evidence. The first question put to him in cross-examination elicited the answer that "Connors was known from one end of Canada to the other in the sardine business and it was the only Canadian company well known." This answer may have been ambiguous, but instead of making the point, if it could be made that Lewis Connors & Sons, Ltd., were not in 1925 carrying on business all over Canada, the cross-examination proceeds thus :

Q. It was also known all over the world ?

A. No—a certain number of countries.

Q. We have had evidence here that this company does a world wide business ?

A. It does now.

Q. We also have evidence that it did then.

A. In a number of countries.

There is not a single question by counsel on behalf of the respondent which even remotely suggests that the two companies in the period up to May 1925 were not carrying on business in competition throughout Canada, and it would seem, taking the evidence as a whole, that this was in effect an admitted fact. It is important to note that the business of Lewis Connors & Sons, Ltd., like that of Connors Bros., Ltd., was a wholesale one. Cases of sardines sold in a province of Canada would presumably find their way into the Yukon Territory and the North-West Territory. Their Lordships do not take the view that the evidence is of a very satisfactory kind; but read as a whole they are of opinion that the Chief Justice

of New Brunswick was justified in coming to the conclusion, which he apparently did without difficulty, that Lewis Connors & Sons, Ltd., had carried on the sardine business in each of the provinces of Canada. No point as to the Territories was made until the matter reached the Supreme Court of Canada, and the answer to that point if it had been made has been suggested above.

It should also be observed that the question of reasonableness being a matter of law for the Court, it has never yet been supposed that it is necessary in relation to the trade of a large manufacturer or merchant to prove to the satisfaction of the Court that the business which the covenant is designed to protect has been carried on in every part of the area mentioned in the covenant. In the cases in which the area has been the whole of England, or a substantial part of it such as 100 or 150 miles from a named town, it has never been held that the covenantee was under an obligation to prove that the business has been carried on in all the towns and villages within the area. In (1894) A C 535² no attempt was made to prove that all the governments of the world, or even of the civilised world, had ordered goods from the company though the greater number no doubt had done so. A great deal no doubt depends on the nature of the business and the area in question. In a country of vast spaces like the Dominion of Canada it will always be possible until the population of the country reaches a point now scarcely contemplated, to point to areas where there are only few settlers or inhabitants and where accordingly few, if any, of the goods sold by the manufacturer have penetrated. If, for example, a restrictive covenant were limited to the Province of Quebec it would seldom be possible to prove that the goods were used in every part of that province; but the goodwill of a business such as is now under consideration could not adequately be protected if the restrictive covenant had to be limited to the towns and villages where actual sales could be proved whilst leaving the vendor free to establish a business, which would almost certainly be competitive, in all the adjoining places. It may be useful to cite in this connexion the words of Lord Parker in (1916) A C 688⁶ at p. 708 :

The goodwill of a business is immune from the danger of the owner exercising his personal knowledge and skill to its detriment, and if the purchaser is to take over such goodwill with all its advantages, it must, in his hands, remain similarly immune. Without therefore a covenant on

the part of the vendor against competition, a purchaser would not get what he is contracting to buy, nor could the vendor give what he is intending to sell. The covenant against competition is therefore reasonable if confined to the area within which it would in all probability enure to the injury of the purchaser.

The words "in all probability" are important; for the question of law as to reasonableness does depend on probability. On careful consideration of all the circumstances their Lordships have come to the conclusion that the right conclusion is that the covenant, so far as space is concerned, was not unreasonable. If the restriction as to space is considered to be reasonable, it is seldom in a case where the sale of a goodwill is concerned that the restriction can be held to be unreasonable because there is no limit as to time. Their Lordships accept as correct the statement by Lord Cave :

It has been settled, I think, since (1837) 6 Ad & E 438¹¹ that, where there is a goodwill to be protected, a covenant in restraint of trade, even when imposed as a condition of employment, may be so framed as to give adequate protection not only to the covenantee himself but also to his successors in the business, and this although it may be necessary for that purpose to impose a restriction upon the covenantee for the remainder of his life: (1921) 2 A C 158¹² at p. 168.

The question whether the restraint ought to be held to be injurious to the public, can be briefly dealt with. It would appear that what is meant by the affirmative proposition is that the restriction is calculated to produce a pernicious monopoly, that is to say a monopoly calculated to enhance prices to an unreasonable extent: (1893) 1 Ch 630¹³ at pp. 646, 668; (1913) A C 781¹ at p. 796. It is well settled that the onus of establishing such a proposition is upon the party who attacks the covenant. When the Court is satisfied that the restraint is reasonable as between the parties it must always be very difficult to prove in a case connected with goodwill that the public interest is affected (1916) A C 688⁶ at pp. 700, 708. In the present case it seems to their Lordships that there are no grounds for holding that a restriction restraining the respondent from carrying on a sardine business in Canada is likely to produce a real monopoly, since every other person in Canada can set up such a business, and the evidence is to the effect that some persons have done so. The

11. (1837) 6 Ad & E 438 : 1 N & P 796 : 2 H & W 464 : 6 L J (N S) Ex 266 : 45 R R 522, *Hitchcock v. Coker*.

12. (1921) 2 A C 158 : 90 L J Ch 436 : 125 L T 744 : 65 S J 626 : 37 T L R 784, *Fitch v. Dawes*.

13. (1893) 1 Ch 630 : 68 L T 833, *Maxim Nordenfelt Guns and Ammunition Co. v. Nordenfelt*.

practical difficulty in successfully competing with the appellants may well be due to their skill and enterprise and long experience. This point therefore also fails.

The conclusion therefore must be that the covenant by Bernard Connors with Connors Bros., Ltd. contained in the agreement of 9th June 1925 is binding as being a reasonable protection of the shares purchased by Connors Bros., Ltd. in Lewis Connors & Sons, Ltd. In the result their Lordships are of opinion that the three questions raised by the originating summons should be dealt with as follows: Question (a) should be answered by a declaration that the respondent is at the present time and will henceforward be barred from engaging in the sardine business in Canada as owner by himself or in partnership with others. No answer should be given to that part of the question relating to the holding of shares in an incorporated company carrying on such a business. Nor should any answer be given to questions (b) and (c). Their Lordships for the above reasons will humbly advise His Majesty that the appeal should be allowed to the extent above mentioned and that the respondent should be ordered to pay to the appellant his costs here and below.

G.N./R.K.

Appeal allowed.

Solicitors for Appellants —

Norton Rose Greenwell & Co.

Respondent *Ex parte*.

(28) A. I. R. 1941 Privy Council 85

(*From Bombay*)

23rd June 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER; SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON

Appa Trimbak Deshpande and another
— Appellants

v.

Waman Govind Deshpande and others
— Respondents.

Privy Council Appeal No. 42 of 1939.

(a) Hindu law—Adoption—Mayukha—Widow can adopt unless expressly forbidden by husband notwithstanding that he died undivided — Consent of his surviving coparceners is not necessary.

Under the Mayukha unless the widow has been expressly forbidden by her husband to adopt she can do so notwithstanding that he died undivided and that she has not obtained the consent of his surviving coparceners: 5 Bom H O R (A O) 181 (F B) and ('33) 20 A I R 1933 P C 1, *Foll.*; 6 Bom 498 (F B), *held overruled by* ('22) 9 A I R 1922 P C 216.

[P 87 C 1]

(b) Evidence Act (1872), S. 41—Suit between A and B — Judgment that suit property did not belong to A as adopted son of C is not judgment in rem.

A judgment in a suit between A and B that the suit property did not belong to A as the adopted son of C as the adoption was invalid is not a judgment in rem and is not conclusive against the strangers as to the fact and validity of adoption: 7 W R 338 (F B), *Rel. on.* [P 87 C 1]

(c) Practice—Privy Council—Respondent not appearing — Privy Council will not determine any matter not strictly within pleadings and issues even if material for decision be on record.

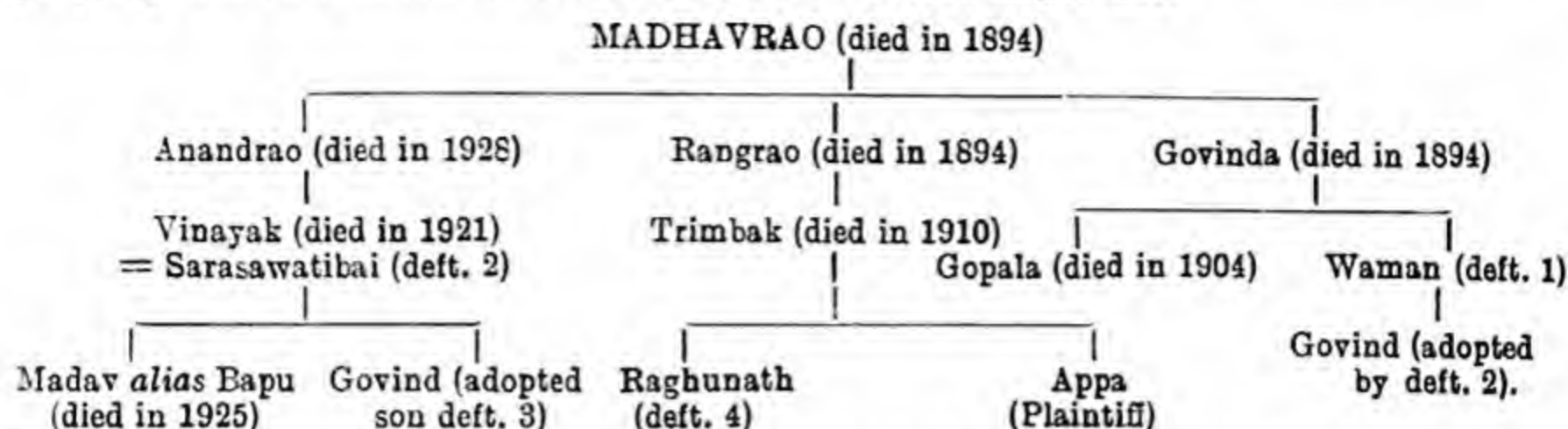
The Privy Council in appeal when the respondent has not appeared will not determine any matter not strictly within the pleadings and the issues as they stand before it even though materials for decision may be on the record. [P 88 C 1]

J. M. Parikh and R. Parikh—for Appellants.

Sir George Rankin — This appeal has been brought in forma pauperis by the plaintiff and defendant 4, who are brothers. No one has appeared at the hearing to represent the respondents but Mr. Parikh has presented the case for the appellants with great care and fairness. In the result their Lordships are of opinion that the case should be remanded upon two points and they will say only what seems necessary to explain the scope and purpose of the remand. In 1865 the appellants' grandfather Rangrao was given by his father Madhavrao to the widow of one Vishnu in adoption to her deceased husband. Madhavrao had two other sons, Anandrao and Govind, and by a deed dated 18th May 1868 to which the father and all three sons were parties the terms upon which the adoption had been made were expressed. A main term was to the effect that upon Madhavrao's death the total income from his ancestral immovables should be divided — not into thirds or shares of 5 as. 4 ps. — but in proportions as follows: to Rangrao notwithstanding his adoption 4 as. 8 ps. and to each of his brothers 5 as. 8 ps.: and that as regards certain property expected to come to Rangrao from his new family, the income from the immovables should be divided so that Rangrao should get a 6 as. 8 ps. share, and the share of each of his brothers should be 4 as. 8 ps. Rangrao was during his father's lifetime to live with him. By cl. 8 of the deed his share of the income from his father's property was to continue to his descendants save that it should not go to any adopted son unless he had been taken from among the issue of Anandrao or Govind. This clause is here mentioned because it has some bearing upon the question

whether upon a true view of the effect of the deed Rangrao's interest in his father's property was an interest in income only or

whether it extended to the capital or corpus of the property — a question which may become important.



Rangrao did not succeed in obtaining possession of any of the properties of Vishnu and he was equally unsuccessful when in 1890 Vishnu's brother Keshavrao died, in obtaining recognition as his heir. Rangrao died in 1894 without having brought the validity of his adoption to the test of a civil suit. His father Madhavrao and his brother Govind died in the same year, leaving Anandrao as the senior member of that branch of the family. In 1894 also, Anandrao as next friend brought a suit (No. 97 of 1894) in the Court at Wai, on behalf of Trimbak (only son of Rangrao and father of the present appellants) laying claim to the properties of Vishnu and his brothers Keshavrao and Ganpat on the footing that they had all been joint and that the two latter had died without leaving issue. This suit was dismissed by the trial Court (19th June 1897) and on first appeal (3rd August 1898) and by the High Court on second appeal (1st March 1899). The ground upon which these decisions proceeded was that as Vishnu was joint with his brother Keshavrao, his widow could not validly adopt a son to him unless she had either his permission or the consent of Keshavrao. This was at the time and had been since 1879 at least the rule of Hindu law accepted as prevailing in the Mahratta country of the Bombay Presidency and thus applicable to the parties. Upon the questions of facts, whether Vishnu had given permission and whether Keshavrao had consented there is no reason to doubt the correctness of the concurrent decisions in the negative.

Trimbak died in 1910 leaving two sons, appellant 2 born in 1908 and appellant 1 (plaintiff) born in 1910. Anandrao continued in the management of the family property till his death in 1928, when defendant 1 Waman took over the management. From the findings of both the Courts in India in the present case it appears that the appel-

lants had in Anandrao's time been receiving from him a share of the income, corresponding in fact to 4 as. 8 ps. and not to a one-third (5 as. 4 ps.) share. The learned Subordinate Judge was of opinion that what they got was paid to them in virtue of their right to a one-third share that, is in recognition, that Rangrao's adoption having proved invalid he had reverted to his original rights as a member of his natural family and not upon the view that he was relegated to the rights given to him by the deed of 1868.

However that may be, from 1928 when defendant 1 Waman succeeded Anandrao in the management of the family properties he refused to pay anything to the appellants. In the present suit, brought on 26th August 1930, the appellants claim to be entitled between them to a one-third share. The decree which they ask for, and which was given to them by the trial Judge on 21st December 1931, is a decree for possession with mesne profits and for partition. The decree was made against the first three defendants who are the respondents upon this appeal, but defendant 2 is the widow of Anandrao's son and does not now appear to have any interest in the matter. The relief claimed by the appellants is as against Waman, defendant 1 (son of Rangrao's brother Govind) and Govind, defendant 3, who was the son of Waman but has been given in adoption to the son of Anandrao. These two defendants represent respectively the branches of Rangrao's brothers Govind and Anandrao and claim to be entitled each to a half share in the suit properties, excluding Rangrao's descendants altogether. The learned Subordinate Judge had no occasion to doubt the invalidity of Rangrao's adoption and had little difficulty in holding that his rights in his natural family remained to him and that the deed of 1868 became void when the adoption was de-

clared in 1899 to be invalid. From this decree the defendants appealed to the High Court and their memorandum of appeal dated 29th March 1932, set out that Rangrao and his heirs were paid an amount corresponding to 4 annas 8 pies under the deed, that the deed became void in 1899 and that the subsequent payments were made purely out of love and sympathy.

The appeal did not come on for hearing till 1935. Meanwhile on 4th November 1932, the rule of law as to the power of a widow to adopt which had in 1899 been applied to Rangrao's adoption had been declared by this board to be erroneous and the true rule under the Mayukha had been declared to be that unless the widow has been expressly forbidden by her husband to adopt she can do so notwithstanding that he died undivided and that she has not obtained the consent of his surviving coparceners: 60 I A 25.¹ This reversed a long-standing decision of a Full Bench of the Bombay High Court, 6 Bom 498² as to which another Full Bench in 50 Bom 468,³ had decided that it had not been overruled by the Board in 48 I A 513.⁴ In 60 I A 25¹ the Board held that 6 Bom 498² had been overruled by 48 I A 513⁴ and they restored as law the interpretation which had been put upon the Mayukha in 5 Bom H C R (A C) 181⁵ a Full Bench decision in the time of Sir Richard Couch. This alteration in the case law had changed the entire complexion of the present case pending the appeal to the High Court. Section 41, Evidence Act, does not give to such decisions as those arrived at in Trimbak's suit of 1894 the character of judgments in rem: indeed it is based upon a judgment of Sir Barnes Peacock, 7 W R 338⁶ at p. 344, in the course of which it was said:

If a judgment in a suit between A and B that certain property for which the suit was brought belonged to A as the adopted son of C were a judgment in rem and conclusive against strangers as to the fact and the validity of the adoption the greatest injustice might be caused.

In the High Court learned counsel for the

present appellants had to admit the validity of Rangrao's adoption subject to a contention as to res judicata which the High Court rightly rejected. On this footing two questions or sets of questions arose. First, whether the appellants though mere strangers to the family of Madhavrao had been in fact for 12 years before 1928 in possession of a one-third or other share in the suit property adversely to the branches of Anandrao and Govind? If so, does not section 28, Limitation Act, entitle them to bring a suit to recover possession of such share against the defendants as trespassers and to obtain a partition thereof as also a decree for mesne profits? Secondly, whether the deed of 1868 was still operative and if so were not the present appellants entitled to enforce the rights given thereunder to Rangrao and his descendants: if so, upon a true construction of the deed did it give them a 4 annas 8 pies share in the properties or only in the income, and to what relief are they entitled?

Though these were the material questions arising upon the footing that the adoption of 1865 was valid neither question had been raised by the pleading or by the issues framed in the trial Court. The only question of limitation had been whether the defendants had been in possession adversely to the plaintiff. The deed of 1868 had not been mentioned in the plaint and the plaintiff in a counter written statement had refused to admit it and had contended that in any case it became inoperative when the adoption was held to be invalid. The learned Judges of the High Court while saying that the agreement of 1868 was undoubtedly acted upon did not decide whether the appellants could recover on the strength of it since the suit was not based on the agreement and indeed the plaintiff had repudiated it.

On the assumption that Rangrao's adoption was invalid, the defendants had contended that he had not reverted to his natural family; hence the plaintiff might have set up any case he desired to make under s. 28, Limitation Act. On the other hand there were more direct answers to this contention of the defendants. The validity of the adoption made an end of the reason given in the plaintiff's pleading for regarding the deed of 1868 as inoperative. It is true that no application to amend the pleadings or to frame new issues was made on behalf of the present appellants in the High Court whose action in disposing of the issues as they stood is hardly open to criticism. But their Lordships finding that a

1. ('39) 20 A I R 1933 P C 1 : 141 I C 9 : 57 Bom 157 : 60 I A 25 (P C), Bhimabai Jiwangauda v. Gurunath Gauda.

2. ('82) 6 Bom 498 (F B), Ramji v. Ghamau.

3. ('26) 18 A I R 1926 Bom 495 : 96 I C 712 : 50 Bom 468 : 28 Bom L R 782 (F B), Ishwar Dadu v. Gajabai.

4. ('22) 9 AIR 1922 P C 216 : 64 I C 536 : 49 Cal 1 : 48 I A 513 : 17 N L R 145 (P O), Yadao v. Namdeo.

5. ('68) 5 Bom H C R (A C) 181 (F B), Rakhmabai v. Radhabai.

6. ('67) 7 W R 338 : Beng L R Sup Vol 662 (F B), Kanhya Lal v. Radha Charan.

change in the case law had put the present appellants in a most embarrassing position are concerned to scrutinise somewhat narrowly a decision which deprives the appellants of an income which for many years had been enjoyed by them, their father and their grandfather. Though not impossible, it is difficult in almost any circumstances to suppose that such an income was received by them without any claim of right. Hence their Lordships think that the dismissal of the suit would entail risk of injustice unless the appellants be allowed the fullest opportunity to make good such case as they may have upon either of the two lines of argument which have been indicated — that is, under S. 28, Limitation Act, and upon the deed of 1868. As the respondents have not appeared at the hearing of this appeal their Lordships do not think it right to determine any matter which is not strictly within the pleadings and issues as they now stand, even though materials for the decision may be on the record.

They consider that the appeal should be allowed and the decree of the High Court dated 20th August 1935 set aside save as regards the directions as to costs therein contained, that the case should go back to the High Court with directions to frame issues in respect of the two questions hereinbefore set forth and to dispose of the appeal to the High Court after determining the same. The High Court is to be at liberty if it should see fit to exercise its power under O. 41, R. 25 to refer such issues to the trial Court and to give all such directions as it may think necessary in respect of the amendment of pleadings and the taking of further evidence provided always that should either party desire to adduce further evidence upon the said issues an opportunity to do so shall be afforded. Their Lordships will humbly advise His Majesty accordingly. There will be no order as regards the costs of this appeal.

G.N./R.K.

*Case remanded.*Solicitors for Appellants — *Harold Shephard.*

Solicitors for Respondents —

Douglas Grant & Dold.

(28) A. I. R. 1941 Privy Council 88

(From Hong Kong)

20th May 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER; SIR GEORGE RANKIN
AND LORD JUSTICE CLAUSON.*Dairen Kisen Kabushiki Kaisha and
others — Appellants*

v.

*Shiang Kee (known as China Merchants
Steam Navigation Company, Ltd.) —
Respondent.*

Privy Council Appeal No. 41 of 1940.

Company — Company dissolved by act of country under whose law it was made juristic entity — Company must be treated as non-existent by all Courts administering English law.

Where a company has ceased to exist by an act of the country by whose acts and under whose law it was made a juristic entity, it must be treated as non-existent by all Courts administering English law: (1933) A C 289, *Rel. on*; (1933) 1 Ch 745, *Ref.* [P 89 C 2]

H. B. Vaisey and H. Atkins (for C. Stevenson)
— for Appellants.

*P. A. Sellers and Kenelm Preedy (for E. V. E.
White)* — for Respondent.

Lord Romer. — The appellants and the respondents are (or were until it ceased to exist) shareholders in a company known as the Ching Kee Steam Navigation Company, Ltd. The company was incorporated in the year 1920 under the laws of the Republic of China, having its head office at Chefoo, in the Chinese Province of Shantung. It had also several branches, one of which was situated at Hong Kong. Its main business appears to have been that of owning steamships, of which, at the outbreak of hostilities between China and Japan, it possessed 20. Of these 6 were, and still are, in the harbour of Hong Kong. On 21st February 1939, the company was dissolved by decree of the District Court of Chungking, Szechuen. In the normal course of things the jurisdiction to make such a decree in the case of this company would have been vested in the District Court of Fooshan, in the Province of Shantung, of which the immediate higher Court was the Shantung Provincial Court. But in February 1939, the Japanese were in military occupation of the Province and the Chinese Courts there were not able to exercise their judicial functions. But it is provided by the Chinese Code of Civil Procedure that whenever a competent Court cannot legally or physically exercise its judicial powers an immediate higher Court may designate some other Court to

assume jurisdiction. Accordingly, on 20th February 1939, the Supreme Court of China made an order designating the District Court of Chungking, Szechuen, to assume jurisdiction over the case of the company. In view of the dissolution of the company the respondents, on 29th March 1939, presented a petition in the Supreme Court of Hong Kong for the winding up of the company under the provisions of the Companies Ordinance, 1932. The jurisdiction to make such an order is conferred upon that Court by s. 313 of the Ordinance, the material provisions of which are :

313 (1) (b). The circumstances in which an unregistered company may be wound up are as follows :

(i) If the company is dissolved, or has ceased to carry on business,

(iii) If the Court is of opinion that it is just and equitable that the company should be wound up.

313 (2). Where a company incorporated outside the colony which has been carrying on business in the colony ceases to carry on business in the colony, it may be wound up as an unregistered company under this Part of this Ordinance notwithstanding that it has been dissolved or otherwise ceased to exist as a company under or by virtue of the laws of the country under which it was incorporated.

The petition came on for hearing before the Chief Justice of Hong Kong on 3rd July 1939, when a winding-up order was made. It should be mentioned that in the meantime — viz., on 5th May 1939 — the order dissolving the company made by the District Court of Chungking had been taken by way of appeal to the Supreme Court, Szechuen, and that the appeal had been dismissed. The present appellants, who had opposed the making of the winding-up order by the Chief Justice appealed in due course to the Full Court of Hong Kong, who by order dated 5th January 1940, dismissed the appeal with costs. From this last mentioned order an appeal is now brought before His Majesty in Council. In opposing the petition before the Chief Justice the appellants relied solely upon what they conceived to be the merits of their case. But in the Full Court they put forward in addition an altogether new contention. They asserted that by reason of the military occupation of the province of Shantung by the Japanese forces, the jurisdiction of the Chinese Courts over the company had been ousted; that the decree of 21st February 1939, was a nullity; and that the company had accordingly never been dissolved. The Full Court, consisting of Lindsell and Fraser JJ., had no difficulty in repelling this contention. And Mr. Vaisey, in presenting his arguments on behalf of the

appellants before this Board, frankly, and quite properly, admitted that he could not challenge the correctness of the decision of the Full Court on this point. The position, therefore, is this. The company has ceased to exist by an act of the country by whose acts and under whose law it was made a juristic entity, and must accordingly be treated as non-existent by all Courts administering English law (see as to this the observations of Lord Wright in (1933) A C 289¹ at p. 297.) In these circumstances both the Chief Justice and the Full Court of Hong Kong held that they had power to order the company to be wound up in that colony.

They found a precedent for so holding in (1933) 1 Ch 745² where Maugham J., as he then was, ordered a winding up in this country of a Russian bank which had a branch office in this country but had been dissolved by Russian legislation. But in truth no precedent was required in order to establish the power of the Supreme Court of Hong Kong to make such an order. The power was expressly conferred upon it by s. 313 (2) of the Companies Ordinance 1932. As the company had ceased to exist it had necessarily ceased to carry on business in the colony, and in such circumstances the sub-section in terms empowers the Court to wind it up notwithstanding that it has been dissolved and ceased to exist by virtue of the law of the Republic of China. That the Court rightly exercised the power so conferred upon it is abundantly clear. There are valuable assets formerly belonging to the company that are still in Hong Kong, and it is essential in the interests both of the former shareholders and of such creditors of the company as there may be that these assets should be protected and distributed amongst those who may be found to be entitled to them. This can only be done by means of a winding-up order. For these reasons their Lordships are of opinion that this appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants must pay the respondents' costs of the appeal.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellants — *Waltons & Co.*

Solicitors for Respondent — *Reid Sharman & Co.*

1. (1933) 1933 A C 289 : 102 L J K B 191 : 148 L T 242 : 76 S J 888 : 49 T L R 94 : 44 Ll L Rep 159, *Lazard Bros. & Co. v. Midland Bank*.
2. (1933) 1 Ch 745 : 102 L J Ch 309 : (1933) B & O R 157 : 149 L T 65 : 77 S J 197 : 49 T L R 253, *In re The Russian Bank for Foreign Trade*.

* (28) A. I. R. 1941 Privy Council 90

(*From Madras*)

(23) A. I. R. 1936 Mad 256

23rd June 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER; SIR GEORGE RANKIN AND
LORD JUSTICE CLAUSON*P. T. Krishnaswami Ayyangar* —
Appellant

v.

Chevula Kamalamma and others —
Respondents.

Privy Council Appeal No. 28 of 1939.

* Transfer of Property Act (1882), S. 59—
Equitable mortgage—Testator executing pro-
note and depositing title deeds of certain property
as collateral security—Suit by plaintiff to en-
force security—Subsequent mortgagee of secu-
rity also impleaded—Security found to be
invalid for want of registration—It is invalid
for all purposes and not merely as between
plaintiff and subsequent mortgagee—Plaintiff
is entitled to simple money decree by virtue of
pro-note—Suit against subsequent mortgagee
should be dismissed with costs—It is wrong for
Court to direct sale of suit property or to make
any pronouncement as to validity or otherwise
of subsequent mortgage or to give subsequent
mortgagee any relief whether against property
or against executors: 1936 M W N 367=(‘36) 23
A I R 1936 Mad 256=163 I C 195, *REVERSED*.

The testator executed a pro-note in favour of the
plaintiff and along with it deposited the title deeds
of certain property *A* as collateral security. On the
testator's death his executors executed a mortgage
of the property *A* in favour of a third person. In
the suit by the plaintiff to enforce the equitable
mortgage created by the collateral security the
subsequent mortgagee was also impleaded. The
collateral security was found to be invalid for want
of registration:

Held that (1) the mortgage security being un-
registered was invalid for all purposes and not
merely as between the plaintiff and the subsequent
mortgagee; [P 92 C 1]

(2) the only decree that could have been properly
made after the declaration of the invalidity of the
mortgage was a simple money decree against the
executors in favour of the plaintiff for the amount
due under the pro-note; [P 92 C 2]

(3) the subsequent mortgagee was not a proper
party to a suit for a money decree and the suit
against him therefore should have been dismissed.

When once it had been decided that the plaintiff
was merely an unsecured creditor of the testator,
the question of the validity or otherwise of the
subsequent mortgage could not by any possibility
be an issue in the suit. It could only arise for
determination if and when the plaintiff would seek
to enforce his decree in execution against the suit
property. It was wrong for the Court to direct a
sale of the property in suit, or to make any pro-
nouncement as to the validity or otherwise of the
subsequent mortgage or to give the subsequent
mortgagee any relief whether as against the pro-
perty or as against the executors: 1936 M W N
367=(‘36) 23 A I R 1936 Mad 256=163 I C 195,
REVERSED. [P 91 C 2; P 92 C 1, 2]

J. P. Eddy and S. P. Khambatta —

for Appellant.

J. M. Parikh and P. V. Subba Row —

for Respondents.

Lord Romer.—Chevula Venkatasubbaya
Chetti, now deceased, was the owner of two
houses in Madras. For the sake of brevity
they may be referred to as Nos. 60 and 68
respectively, and their owner as the testator.
On 2nd June 1919, the testator executed a
promissory note for Rs. 12,000 bearing in-
terest at 9 per cent. per annum in favour of
one Rangayya Chetti and deposited with
him the title deeds of No. 60 as security. At
the same time the testator executed a docu-
ment headed “Collateral Security Bond”
which recorded the fact of the deposit of the
title deeds as collateral security in respect
of the promissory note and then proceeded
as follows:

I shall therefore pay you the principal and
interest accruing due on the said promissory note
from this date in full, and redeem the said title
deeds. To this effect is the collateral security bond
executed by me with consent.

This document was never registered. The
testator died in the year 1920 having by his
will appointed four executors of whom res-
pondents 1 and 2 and one Chevula Subra-
manyam Chetti appear to be alone surviving.
It should be mentioned that the will con-
tained an express provision that the two
houses should not be sold. Rangayya Chetti
died in the year 1921, and on 13th October
1930, his junior widow Gouriamma who was
his sole legal personal representative insti-
tuted the present proceedings for the purpose
of enforcing the equitable mortgage pur-
porting to have been created in favour of
Rangayya by the deposit of the title deeds
of No. 60.

The first three defendants to the suit were
the surviving executors of the testator.
Defendant 4 was the present appellant. The
reason for adding him as a party was this.
On 26th June 1924, the first three defendants
and on 24th November of the same year the
first two defendants as executors of the
testator had executed mortgages in favour
of the appellant of both the houses to secure
various sums of money that they had bor-
rowed from him or that he had paid at their
request. He was, therefore, assuming these
mortgages to have been valid, a necessary
party to the proceedings. The relief that
Gouriamma asked for by her plaint was the
usual relief sought in a suit by a mortgagee
to enforce his security. The first two defen-
dants (being the present respondents 1 and 2)
by their written statement impeached the

validity of the equitable mortgage in suit on the ground that it was created by the collateral security bond and that the document had never been registered. Defendant 3, Subramahmanyam neither filed a written statement nor took part in any of the subsequent proceedings in the suit. The appellant by his written statement put the plaintiff to proof of the equitable mortgage but did not in terms impeach its validity. In due course issues were directed to be tried of which the only ones now material were to the following effect:

2. Is the mortgage sued upon invalid? (5) Are the mortgages in favour of defendant 4 binding on the estate of the testator? (6) What is the amount due upon those mortgages?

On 6th September 1932, the case came on for trial before Beasley C. J. After a consideration of the relevant authorities he came to the conclusion that the collateral security bond did not require registration and that a valid equitable mortgage upon No. 60 had been created by the deposit of the title deeds. He accordingly pronounced the usual mortgage decree in favour of the plaintiff. The appellant did not at the trial adduce any evidence to prove his mortgages. The learned Chief Justice in those circumstances made no findings upon issues 5 or 6. The decree merely provided that the appellant should be at liberty to enforce his claim as a second mortgagee of the suit property by a separate suit. With this decision upholding the validity of the plaintiff's mortgage defendants 1 and 2 appeared to be content. The appellant, however, took the matter to the appellate side of the High Court where it came on for hearing on 11th May 1933, before Ramesam and Cornish JJ. Those learned Judges took the view that unless the appellant's mortgages were valid and there was something remaining due upon them the appellant had no right to be heard on the appeal. They accordingly remanded the case to the Judge sitting on the original side to submit his findings upon issues 5 and 6. They ordered however that the costs entailed by the additional hearing, that is to say, the hearing fee and the fee payable to counsel should be paid by the appellant in any event.

The trial of these two issues took place before Anantakrishna Ayyar J. in August 1933, and on 25th of that month he gave judgment recording his findings upon them. It is unnecessary to deal with them in any detail. It is sufficient to say that on issue 6 he found that, assuming the appellant's mort-

gages to be valid, there was a substantial sum due to him thereunder which would be properly payable out of the testator's estate. He made no finding upon issue 5 which raised a question of law rather than one of fact. It was the question whether in view of the provisions of S. 307, Succession Act, the executors had power to mortgage the houses of their testator. He thought that this question could not properly be answered until the question of the validity of the plaintiff's own mortgage had been settled.

The hearing of the appeal before Ramesam and Cornish JJ. was resumed on 26th July 1935. They evidently thought that the findings of Anantakrishna Ayyar J. were sufficient to establish the right of the appellant to be heard upon the appeal, for they proceeded to consider the question of whether the collateral security bond of 2nd June 1919 required registration. Differing from the Chief Justice upon the point they decided that it did, and that the plaintiff's suit so far as it sought to enforce a charge upon No. 60 was not maintainable. The plaintiff, however, was by virtue of the promissory note an unsecured creditor of the testator's estate for so much of the Rs. 12,000 as still remained owing together with arrears of interest and was entitled to a simple money decree against the executors for that amount. But the appellant was not a proper party to a suit for such a decree. The suit against him should therefore have been dismissed with costs. When once it had been decided that the plaintiff was merely an unsecured creditor of the testator, the question of the validity or otherwise of the appellant's mortgages could not by any possibility be an issue in the suit. It would only arise for determination if and when the plaintiff should seek to enforce her decree in execution against No. 60. (It should be mentioned here that No. 68 had long since been sold in proceedings instituted by a person who held a mortgage on that house granted by the testator.)

The learned Judges nevertheless proceeded to discuss the question at some length, and eventually arrived at the conclusion that the mortgages were beyond the competence of the executors and were accordingly invalid as between the appellant on the one hand and the plaintiff and the rest of the unsecured creditors of the testator on the other; but that the mortgages were valid as between the appellant and the executors, by which the learned Judges meant, as will presently appear, that it was valid as be-

tween the appellant and the persons interested in the testator's estate other than the creditors. They also held that the appellant was entitled to stand in the shoes of the unsecured creditors whose debts had been paid off out of the moneys advanced by him on the security of his two mortgages. Having arrived at these conclusions and having ascertained that the amount remaining due to the appellant on the footing just mentioned was Rs. Y, and that of the total amount advanced by him under his mortgages there still remained due for principal and interest the sum of Rs. X, and that the sum due to the plaintiff on the promissory note for principal and interest was Rs. 18,985-6-4, the learned Judges gave effect to their several findings in a decree dated 26th July 1935. Stated shortly it was to this effect: the appeal was allowed, the decree of 6th September 1932 was set aside and declarations were made substantially as follows: (1) that the equitable mortgage of 2nd June 1919, was not valid as a mortgage as between the plaintiff and the appellant as it was not registered; (2) that the mortgage by the executors of No. 60 in favour of the appellant was not valid as a mortgage as between the plaintiff and the appellant and (3) that the plaintiff and the appellant were respectively entitled to money decrees for the debts due to them, viz., Rs. 18,985-6-4 to the plaintiff and Rs. X to the appellant. The decree then went on to order a sale of No. 60 and directed in effect that out of the net sale proceeds Rs. 18,985-6-4 should be paid to the plaintiff and Rs. Y to the appellant, but that if any balance should be left after making such payments it should be applied in payment to the appellant of Rs. X-Y. In case of deficiency the plaintiff and the appellant were to be at liberty to apply to the Court for payment of the same by the defendant executors. Finally, it was ordered that each party should pay his or their own costs of the appeal and in the Court below. From this decree the appellant now appeals to His Majesty in Council. It will be observed that the decree treats the plaintiff and the appellant as being the only creditors of the testator, the only creditors at any rate who were entitled to be paid out of the proceeds of sale of the property in suit. As to this Ramesam J., made the following observations:

It is necessary to mention one matter. After the whole argument was closed it was represented to us that there are other creditors who up to now have not taken any action. They are not parties to this suit. We do not think that we can adjourn

this suit to enable them to be made parties at this stage. It is possible that the claims of some of them are barred. So far as the plaintiff and defendant 4 are concerned, the form of the relief we have given practically takes the form of relief in an administration action as between them only and as if there are no other creditors. But when there are other creditors, our adjudication does not bind them. They can take separate action impleading these parties and get appropriate relief.

If it had been necessary to consider the position of the other creditors at all, and it was not, their Lordships cannot think that this was a satisfactory way of dealing with them. Nor can their Lordships think that it was proper to qualify the declaration as to the invalidity of the plaintiff's mortgage by the insertion of the words "as between the plaintiff and defendant 4." If the mortgage security be invalid by reason of the failure to have it registered, it is invalid for all purposes. That it required registration must be taken to have been finally determined, there being no cross-appeal by respondents 3 to 6 who now represent the estate of Rangayya Chetti in lieu of the plaintiff who has died since the decree was pronounced. It necessarily follows that the only decree that could properly have been made after a declaration of the invalidity of the mortgage was a simple money decree against the executors in favour of the plaintiff for Rs. 18,985-6-4. With all respect to the learned Judges it was wrong to direct a sale of the property in suit, or to make any pronouncement as to the validity or otherwise of the appellant's mortgages, or to give the appellant any relief whether as against the property or as against the executors. Whether or not the appellant will eventually obtain anything better than was given him by the decree is a question upon which it is not for their Lordships to express any opinion. He is entitled to appeal from it if he thinks fit, and to have the decree put into the proper form.

In their Lordships' opinion the appeal should be allowed, and the decree of 26th July 1935 should be varied as follows: there should be omitted from the first declaration the words "as between the plaintiff and defendant 4;" the whole of the decree subsequent to such declaration should be omitted with the exception of the order as to costs, and there should be substituted a simple money decree for payment to the plaintiff out of the property of the testator of Rs. 18,985-6-4 with interest at six per cent. per annum from 26th July 1935; the order for costs should be varied by inserting after the words "each party" the words "other

borrowed the Rs. 70,000 and made himself personally liable for the amount, and that he did not use the returned money to pay off the lenders; and there is no evidence that he applied any part of it for the benefit of Subbaya. And it would appear strange that Subbaya should hand over property of the firm in which he had one-eighth interest to Kasi for nothing. The suggestion made was that the scheme enabled Subbaya to enter the price as a credit to the firm, and then by book-keeping entries wipe out a debt due to the plaintiffs' firm from the Letpadan firm of which he and his elder brother were partners, debiting himself with the whole price. This is in fact what he did, but it hardly seems to require the assistance of Kasi: especially as in two other cases Subbaya seems to have dealt similarly with sums received from the firm, for one of which cases he was eventually sentenced to imprisonment. However whatever the motive, it is said that Kasi undoubtedly did receive the money back, for the next day it is alleged that he took Rs. 70,000 to the R. M. P. M. bank, and received from the bank four cheques, one on the Central Bank, one on the Allahabad Bank and two on the National City Bank for Rs. 66,000. If in fact Kasi was in possession of Rs. 70,000 the next day there can be no doubt, whatever the motive of the fraud, that the plaintiffs' case is proved. Subbaya gave evidence that he returned the money to Kasi, but as Subbaya was in any view an accomplice, had himself been convicted of fraud on the plaintiffs' firm, and had by the terms of a compromise in the partnership suit brought by Nagappa a substantial interest in the success of the plaintiffs' claim his evidence of itself is not of much value. Everything therefore seemed to turn on proof that these cheques were issued for cash to Kasi on 6th January.

The kind of business represented by these cheque transactions is said not to be unusual in this kind of bank. The bank being ready to receive cash, takes an amount offered and gives to the temporary customer a cheque drawn on one of the recognized banks. There is an understanding that the cheque is not to be presented till a definite date: on which date it will either be presented to the bank on which it is drawn or returned to the Chettiar bank which issued it in exchange for cash. The cheque is drawn in the name of the customer: there is a diary kept recording the cheque and the due date: but according to the evidence there is no other entry kept in the bank's

books other than a debit in the day book of a cheque on the named bank. What happens to the cash account which has temporarily been increased by the sum paid for the cheque was not explained. It was in respect of business of this nature that Kasi is said to have come to the bank on 6th January, and paying over Rs. 70,000 to have received cheques for Rs. 66,000 and to have created a credit for the balance in favour of Ganesh and Co., a firm with which he was intimately associated. Kasi denies that he received the money from Subbaya on the 5th, that he went to the bank on the 6th, or received any cheques. There is no doubt that cheques for Rs. 66,000 drawn on the banks mentioned above are entered in the books of the R. M. P. M. bank on 6th January, but there is nothing in the books to identify them with Kasi. Neither the cheques nor the counterfoils, nor the diary were produced in evidence. There was evidence of two witnesses that cheques were given to Kasi on that day to which reference will be made later. But the plaintiffs' case did not rest alone on the entries of the cheques on the day on which they were issued. They were returned unpaid at different dates within about a month: and on those dates it is said that there are entries showing that the cash which on their return would be available to Kasi was used in creating credits at his request in favour of firms in which he was interested: and in one case in creating a temporary loan of Rs. 7500 by him to the bank not on this occasion by means of a cheque. There is no separate account opened in respect of each cheque: no credit therefore is set against the amount of the cheque: none of the entries are in terms associated with Kasi, except the loan account of Rs. 7500: and in respect of the original entry of that amount in the daybook there is an unfortunate blot which might serve to conceal the full initials of the name referred to. In the ledger the entry appears in Kasi's full names. Kasi denies that he ever made such a loan: and as to the other amounts gives explanations which were not disproved, indicating that they had nothing to do with the Rs. 70,000. A substantial balance of the cheques remains with no indication at all as to what happened to it.

As to the parol evidence, Somasundaram who was "agent" of the bank, and appears to be an independent and respectable witness gave evidence that Kasi came to the bank on the 6th with money and wanted

cheques. He referred him to the clerks whose duty it was to deal with the matter. He does not know how much money he brought, or what cheques he got. Another clerk, Subramanian, was more definite. According to him, Kasi conducted the actual transaction with him: brought him Rupees 70,000 which was laid on his desk: and received the cheques. He said he could not state the contents of the cheques without seeing them. It appeared, however, from other evidence that Subramanian, who was only a junior clerk, was not entrusted with the duty of handling cash: and it was said that he had been discharged from a former employment for dishonesty. The trial Judge placed no reliance on his evidence. For the defendants evidence was given by another clerk of the banking firm, Paraparam, also apparently an independent witness of integrity. He was senior to Subramanian and with three other clerks was in charge of cash. He had supervised the transaction on 5th January when Kasi was given the cheque for Rs. 70,000. He says that Kasi did not bring any money to the bank on 6th January: and that the bank did not issue any cheques to Kasi on that day or subsequently. There is thus a complete conflict between two responsible clerks in the Chettiar bank on this vital question of the cheques. But as regard Somasundaram the defendants have a legitimate criticism to make, viz., that he had given his evidence at an early stage in the case and his evidence was the first indication that the defendants had that the plaintiff's case was that the purchase price had been paid and then returned. Their Lordships are not prepared to decide this case at this stage on the footing that such a case was not open on the pleadings. But when the evidence was returned the defendants not unnaturally applied for further opportunity of cross-examining Somasundaram in the light of the books. Unfortunately this was refused and the refusal was upheld by the High Court on revision. His evidence on this point is obviously of less weight than if it had been fully tested. In the result as it appears to their Lordships the whole case depended upon the contents of the cheques. If drawn in favour of Kasi he must fail: if drawn in favour of strangers unconnected with Kasi the plaintiffs fail. But neither cheques nor counterfoils were produced. Nor is there satisfactory evidence that they had been lost or destroyed. Their Lordships would be reluctant to decide the case on

any technical objection that the evidence as to the cheques was inadmissible in their absence. But on the evidence as it stood there was so little reliable evidence to connect Kasi with the alleged dealings with bank on and after 6th January that the case of fraud must fail.

There are other difficulties in the plaintiffs' way which have been sufficiently considered in the judgments of the High Court. Fraud of this nature, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt. The High Court were justified in holding that the trial Judge's finding was largely based on suspicion and conjecture. There were documents unaccounted for which would conclusively prove the issue one way or the other. In their absence the High Court's decision on the merits was right and cannot be disturbed. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellants — *Lambert & White.*

Solicitors for Respondents — *Harold Shephard.*

(28) A. I. R. 1941 Privy Council 95

(From Calcutta)

23rd June 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER, AND SIR GEORGE RANKIN

Bhowanipur Banking Corporation, Ltd.
— Appellants

v.

Sreemati Durgesh Nandini Dassi —
Respondent.

Privy Council Appeal No. 79 of 1939.

(a) Contract Act (1872), S. 23—Agreement to stifle prosecution—Essence of defence stated—Defendant must establish contract whereby proposed or actual prosecutor agrees as part of consideration received or to be received not to bring or to discontinue criminal proceedings—Fact that debt forming consideration was real is irrelevant—Proof that actual crime was committed is not necessary—But each party should understand that one is making his promise in exchange for promise of other not to prosecute or continue prosecuting.

In the case of an agreement to stifle prosecution, it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. The fact that the debt forming the consideration was real is

irrelevant. It is of course impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Proof that there has actually been a crime committed is obviously unnecessary. But it is necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage: (1891) 2 Ch 587, *Approved*. [P 96 C 2]

(b) Evidence—Witness unreliable as some of his evidence found untrue — Statement of such witness cannot be relied on unless supported by independent evidence.

The fact that a witness is unreliable as some of his evidence is found to be untrue only means that a statement made by such a witness cannot be relied on unless supported by independent evidence. [P 98 C 2]

Sir Herbert Cunliffe and W. Wallach —
for Appellants.

W. W. K. Page — for Respondent.

Lord Atkin.—This is an appeal from a decree of the High Court of Judicature in Bengal which reversed a decree of the Subordinate Judge in favour of the present appellants, the plaintiffs in the suit. The suit was to recover a sum due upon a mortgage bond executed by the respondent and for the usual relief in a mortgage suit in default of payment. The bond reciting that the husband of the mortgagor was indebted to the bank in the sum of Rs. 1,78,965 and that the mortgagor desired to reduce his debt by borrowing money by mortgage of her own property, provided that the mortgagor borrowed from the bank Rs. 30,000 and mortgaged to them the immovable property there stated. The plaint alleged that no part of the principal or interest had been paid. The defendant by her written statement set up a number of defences such as that she was a pardanashin lady and was not fully advised of the nature of the bond, that she was coerced into executing it, that it was not duly executed or attested and that she did not receive the consideration money. All these defences were negatived by the trial Judge and nothing further has been heard of them. But the defence remained which was also rejected by the trial Judge but accepted by the High Court and is the question in issue in the present

appeal. It was that the mortgage bond in question was given as part of the consideration for a promise by the bank to withdraw criminal proceedings against one Kalidas, the mortgagor's husband. If established this would plainly afford a defence under S. 23, Contract Act. The law in regard to agreements to stifle prosecutions is reasonably clear. The Board were referred to the various considerations set out at length in the well-known judgment of Vaughan Williams J. in (1891) 2 Ch 587.¹ The learned Judge is in fact doing nothing more than considering the elements that go to the making of a simple contract, for it is of the essence of the defence that the defendant should establish a contract whereby the proposed or actual prosecutor agrees as part of the consideration received or to be received by him either not to bring or to discontinue criminal proceedings for some alleged offence. It is of course impossible for such a contract to be made unless both parties know of the proposed or actual proceedings. Vaughan Williams J. inadvertently says "must be cognisant of the crime." Proof that there has actually been a crime committed is obviously unnecessary. But it is also of course necessary that each party should understand that the one is making his promise in exchange or part exchange for the promise of the other not to prosecute or continue prosecuting. In all criminal cases reparation where possible is the duty of the offender, and is to be encouraged. It would be a public mischief if on reparation being made or promised by the offender or his friends or relatives mercy shown by the injured party should be used as a pretext for avoiding the reparation promised. On the other hand to insist on reparation as a consideration for a promise to abandon criminal proceedings is a serious abuse of the right of private prosecution. The citizen who proposes to vindicate the criminal law must do so wholeheartedly in the interests of justice, and must not seek his own advantage. It only remains to say that such agreements are from their very nature seldom set out on paper. Like many other contracts they have to be inferred from the conduct of the parties after a survey of the whole circumstances.

It is not difficult to apply these principles to the facts of the present case. Kalidas the defendant's husband was a vakil of the

1. (1891) 2 Ch 587 : 60 L J Ch 564 ; 65 L T 314, *Jones v. Merionethshire Permanent Building Society*.

High Court. He had been employed as legal adviser of the plaintiff's bank: his brother Taradas had been manager: a nephew Birendra was a clerk in the bank. Kalidas and his son Jitendra had accounts with the bank, and apparently had been allowed overdrafts against security. In 1924 the bank discovered that both Kalidas and Jitendra had been allowed to overdraw far beyond the value of their securities. They suspended the manager, and began to require payment from Kalidas without much apparent result. On 1st April 1925, the bank commenced criminal proceedings against Taridas, Kalidas, Jitendra, Birendra and one Parindra also a nephew of Kalidas and a customer of the bank, charging them with conspiracy to cheat and defraud the bank of 3 to 4 lakhs of rupees. There were apparently other concurrent proceedings against the three accused other than Kalidas and his son Jitendra; but the nature of these was not fully explained. The order sheet of the Magistrate is significant.

Sections 120B, 420, 408 and 406, I. P. C.

1-4. Summon accused under Ss. 120B, 420, 408 and 406, I. P. C., for the 6th.

6-4. Accused appear. They will give P. R. of Rs. 2000 each, date 15th April.

15-4. There is a talk of compromise. Date 24th April.

24-4. Parties want time. Date 29th April.

29-4. Case adjourned to 4-5 at the request of both parties, on which date either P. Ws. to be produced or the case settled. Accused as before.

18-5. To Mr. I. J. Cohen for favour of disposal.

18-5-25. Parties not ready. Application for adjournment filed; put up on 1st June 1925. Accused as before.

1-6-25. The complainant puts in a petition for time. To 15th June 1925 for the last time (illegible). Accused as before.

15-6-25. Accused Kalidas Roy Chowdhury is reported to be ill; m. c. filed and application for adjournment filed. To 29th June 1925 for the last time (illegible). Accused as before.

29-6-25. The prosecution puts in a petition saying that under circumstances stated thereon they do not offer any evidence. Accused discharged under S. 253, Criminal P. C.

Now while these proceedings were being adjourned after the "talk of compromise" on 15th April negotiations were proceeding between the bank and Kalidas initiated by a letter of 26th April in which he states that though there is no substance in the criminal proceedings he is willing to place for settlement the dispute about the liabilities of his son and himself in the hands of an arbitrator. He suggests certain names and "hope that the matter would thus be speedily brought to termination." The bank are now pressing. On 27th April they accept the proposal for arbitration as the arbitrator is

willing to arbitrate expeditiously in a week or so, but the matter must be placed before the arbitrator by the 29th without fail. If the submission was not signed by the 29th the reference "would stand automatically cancelled." The submission was signed on 30th April: and on 14th May the arbitrator made his award that Rs. 1,54,650 was due from Kalidas and Rs. 55,500 from Jitendra for which Kalidas also was liable. On 16th May Kalidas makes proposals for paying his liabilities by transferring to the bank all his securities and conveying to the bank certain named premises:

I have already told you that I have no cash money to pay. I am willing to execute an agreement pending the completion of the necessary documents of transfer, and in the meantime as arranged before the criminal case against us will be withdrawn.

The bank obviously cannot let this last statement remain unanswered:

The directors cannot do anything about the criminal case. They deny that there was any arrangement with him about his criminal case. It is only his civil liability to the bank which he wanted to settle by arbitration and the directors agreed. But they can only say before the Court this that the liability of Kalidas and his son has been fully adjusted with the bank when Kalidas makes payment of the sum decreed against him.

They go on to say that the suit can only be adjusted by payment or by mortgaging properties of value double the amount for which they are the security. On 20th May Kalidas for the first time suggests that he may give the bank a property with a net income of Rs. 7000 a year, which was in fact the property the subject of the present suit. The bank reply on 22nd May that they will take the property in mortgage as security for such portion as it is worth. They add the significant sentence "for the balance Kalidas Babu, if he wants a settlement, must make arrangement without delay." Negotiations as to the mortgage of the property in question must have commenced after this, for, on 27th June defendant 1 appears on the scene by signing on the bank form a proposal for the mortgaging of the property in suit which states that the title deeds have been already supplied, and states the amount required as Rs. 30,000. At this date the criminal proceedings stood adjourned from 15th June to 29th June "for the last time." On 25th June the draft mortgage prepared by the bank was sent to the defendant and on 27th June it was executed, and registered. Rupees 30000 was handed to the defendant, Rs. 25,000 was paid by her husband to the bank in respect of his debt on the same day; and as found by

the Judge Rs. 5000 was retained by the defendant until 25th July, when it was paid into the bank on her behalf by Jitendra. Of this sum Rs. 2338 was retained by the bank for the costs of the mortgage and another mortgage of the same date by her husband: and the balance was drawn in different sums by the defendant over the next two or three months. As has been said the mortgage was completed on 27th June, the criminal case having been adjourned to 29th June for the last time. On that date a petition was presented to the Court on behalf of the bank as follows:

In the Court of the Honorary Magistrate,
Alipore.

Prokash Chandra Bose,

versus

Kalidas Rai Chowdhury and others

Section 420/120B, I. P. C.

The humble petition of Prokash Chandra Bose, complainant abovenamed,

Most respectfully sheweth:

That in the above case Babu Kalidas Roy Chaudhury and his son Babu Jitendra Kumar Roy Chaudhury have made up their differences with the bank and have voluntarily made arrangements for the payment of the moneys due from them.

That the other three accused persons are undergoing trial in the Court of the Police Magistrate, Alipore, and a charge under S. 420/120B, I. P. C., has been framed against them along with other charges and there is no necessity for another trial.

That your petitioner, therefore, does not desire to further proceed with the case or adduce any evidence.

Your petitioner, therefore, prays that your honour will be pleased to discharge the accused.

And your petitioner, as in duty bound, shall ever pray.

Alipore 29-6-'25.

It is difficult to see what more cogent proof there could be of an agreement to stifle a prosecution. "The accused" "have made arrangements for the payment of the moneys due from them." . . . "Your petitioner, therefore, does not desire to proceed further with the case." The reason why this petition is in this ingenious form, and was acceded to by the Magistrate is probably that suggested by the Chief Justice in his judgment in the similar case against Kalidas which is also under appeal. The accused were charged under Ss. 120B, 420, 403 and 406, Penal Code. As the Chief Justice said:

Section 120B is the offence of conspiracy to commit a criminal offence and is not compoundable. Section 406 is an offence to commit a criminal breach of trust and is not compoundable. Section 408 is the offence of criminal breach of trust by a clerk or servant and is not compoundable. Section 420 is the offence of cheating by dishonestly inducing the delivery of property and is, with the permission of the Court before whom the prosecution for such offence is pending, compound-

able by the person cheated (S. 345, Civil P. C.). It may be due to inadvertence, or it may not be, that the petition for the discharge of the accused mentioned S. 420 but not Ss. 406 and 408. In any event the accused were discharged in respect of all the offences not merely S. 420 but also Ss. 120B, 406 and 408 which are non-compoundable.

The case, therefore, seems to be one in which the prosecutors have plainly stated that they have compounded a non-compoundable offence: and it cannot be disputed that part of the terms of composition was the mortgage given by the defendant. But the evidence does not rest there. The defendant and her son Satyendra both give evidence that the defendant was told by her husband that there were criminal proceedings pending and that the mortgage was for the purpose of having them withdrawn. It is true that they are both unreliable witnesses in that some of their evidence as to the payment of the consideration, the facts of the execution and other matters are untrue. But this only means that a statement made by such a witness cannot be relied on unless supported by independent evidence. When the bank state before the Magistrate that there is talk of compromise, take adjournments obviously to arrange the compromise, make a compromise which includes taking the mortgage in question, and then ask to withdraw the case because of the compromise, there seems little doubt that the lady and her son were in this respect telling the truth. It was contended that even if the illegal agreement with Kalidas were proved, yet there was no reliable evidence that the wife knew of the criminal proceedings, and that she would have come to the relief of the husband merely to discharge the civil debt. Their Lordships must not be taken to accede to the view that even on this state of facts the wife's security obtained by the husband to effectuate his unlawful agreement would not be invalidated. But from the facts of this case the knowledge of the wife seems an irresistible inference. Their Lordships, therefore, agree with the decision of the High Court, though they do not follow the reasoning of one of the learned Judges that the money consideration to the wife was illusory. It was real enough: but it was not the only consideration. They desire also to point out that the learned Subordinate Judge has attached undue weight to the fact that here there was a debt really due from Kalidas. In this class of case that fact seems irrelevant if the agreement to abandon a prosecution is part of the consideration for

payment of the debt. In most cases of this kind there is a debt or a liability. Indeed if there were not, a demand and receipt of money in consideration of refraining from or withholding a prosecution would apparently in itself be a criminal offence. Their Lordships will humbly advise His Majesty that this appeal be dismissed. The respondent having relied on an infringement of public policy has successfully maintained on appeal her contention, and is entitled to her costs of this appeal.

G.N./R.K. *Appeal dismissed.*

Solicitors for Appellants—*Hy. S. L. Polak & Co.*

Solicitors for Respondent —

Stanley Johnson & Allen.

(28) A. I. R. 1941 Privy Council 99

(From Palestine)

28th April 1941

VISCOUNT SANKEY, LORD ATKIN, LORD
THANKERTON, SIR GEORGE RANKIN AND
LORD JUSTICE CLAUSON.

Heirs of Prince Mohamed Selim —

Appellant

v.

Attorney-General of Palestine —

Respondent.

Privy Council Appeal No. 21 of 1940.

(a) Land Court Rules (Jaffa) (1921), R. 2—
R. 2 is impliedly repealed by Establishment of
Courts Orders (1924-31).

When an ordinance has prescribed without reserve that the Court shall consist of two or more Judges it seems impossible that a rule should survive which prescribes that in a certain event the Court shall consist of two Judges and a non-Judge, whether Magistrate or Cadi. Therefore R. 2 of the Land Court Rules must be taken to have been impliedly repealed by the Establishment of Courts Orders, 1924-31. [P 100 C 1]

(b) Record of Rights—Entry in—Rectification—Onus of proving that entry is wrong is on person who seeks rectification—Land (Settlement of Title) Ordinance, 1928/39, Ss. 43, 66.

A person is entitled to rely on his registered title until displaced. Therefore where a person whose name was found in the previous register claims that his name has been wrongly omitted in a subsequent register and seeks rectification, the onus of proof is quite plainly upon him to show that the entry which is *prima facie* right ought not to be there and not on the other person in whose favour the entry is made. [P 100 C 2; P 101 C 1]

(c) Practice—Appeal—Lower Court decision vitiated by misdirection as regards onus—Dispute involving questions of law and fact—Appeal lying only on question of law—New trial held should be ordered.

Where the decision of the lower Court was obviously vitiated by misdirection as regards onus and the determination of the dispute involved

questions of fact as well as law, and an appeal lay only on a question of law :

Held that the appellate Court should order a new trial. [P 101 C 1]

A. T. Miller and Colin H. Pearson —

for Appellant.

Attorney-General and Norman Bentwich —

for Respondent.

Lord Atkin. — This is an appeal from a judgment of the Supreme Court of Palestine setting aside a judgment of the Land Court at Jaffa in favour of the appellants and directing a new trial. Special leave to appeal was given by His Majesty in Council, but in the order it was provided that the appeal was to be confined to the grounds of the judgment of the Supreme Court. Within this limited scope it will be possible to deal shortly with this appeal. The suit was brought by the plaintiffs, the heirs of Prince Mohammad Selim, himself one of the heirs of the late Sultan Abdul Hamid II of Turkey, to recover lands said to have been the private property of the late Sultan, and to have the Land Registry at Gaza rectified by inserting the names of the plaintiffs in respect of their share of the property in place of the High Commissioner for the time being in trust for the Government of Palestine. It would appear that land in question was registered in the land register for Gaza in the name of the late Sultan from about the year 1886. The respondent's case is that after the deportation of the late Sultan the Ottoman Government by various decrees took the property in this land, and that following the Treaty of Peace made in Lausanne in 1923 the Government of Palestine acquired the land. The Government by various ordinances proceeded to a settlement of this and other lands in Palestine, and this land was eventually entered in the new register as in the proprietorship of the High Commissioner in trust for the Government of Palestine. The suit of the plaintiffs was heard in May 1937, before the two Judges of the Land Court of Jaffa, Cressall and Daoudi JJ. who first proceeded to determine upon whom lay the onus of proof. They both agreed that the onus was upon the defendant, the representative of the Government, to support his title. Having so determined, they then proceeded to hear the case, and after a hearing of six or seven days proceeded to deliver considered judgments, Cressall J. holding that the defendants had failed to discharge the onus upon them, Daoudi J. holding that they had succeeded. Having arrived at this unfortunate

position, the two Judges proceeded after argument to decide what the result should be. They were referred to rule 2 of the Land Court Rules, 1921, which provided :

(1) The Land Court shall, save as hereinafter provided, consist of a British Judge as President and a Palestinian member. (2) In case of disagreement the Court may call in any Magistrate or member of the District Court or a Cadi as a third member.

They refused to act on this rule, holding that it had been impliedly repealed by the Establishment of Courts Orders, 1924-1931, which provided without any saving that the Land Court of Jaffa should be constituted by the President of the District Court of Jaffa or a relieving President and one or more Judges of the District Court of Jaffa. Such an ordinance they considered was inconsistent with a rule which provided that in the case of disagreement the Court might be constituted by two Judges and a Magistrate or Cadi. In any case they held that the rule was facultative only and not imperative, and in this particular case they would not have followed it. They proceeded therefore to determine the case, and agreed that as the defendant had to satisfy the Court, and had only succeeded in satisfying one member of the Court, he had failed in the suit, and they proceeded to pass a decree in favour of the plaintiffs. On appeal the Supreme Court disagreed with the views expressed as to rule 2. They held that the rule was still in force and was imperative. The Land Court therefore had not passed a valid judgment, and there must be a new trial. They also held that the Land Court were in error in placing the onus upon the defendant. The grounds of the judgment therefore which emerge as being those with which alone this board are empowered to deal on the terms of the order giving leave to appeal are: (1) Is rule 2 of the Land Rules, 1921, still operative? (2) Was the onus of proof rightly placed upon the defendant?

Their Lordships will be careful to decide nothing more :

1. On the first point their Lordships accept the reasoning of the Land Court. When an ordinance has prescribed without reserve that the Court shall consist of two or more Judges it seems impossible that a rule should survive which prescribes that in a certain event the Court shall consist of two Judges and a non-Judge, whether Magistrate or Cadi. At the time of the decision no provision had been made for the event of disagreement, and it was thus impossible to rule that there was an imperative obli-

gation to call in a third Judge. Fortunately this position has now been remedied, first by the Court Amendment Ordinance No. 2, 1939, section 6 (a), which expressly provides for the event of disagreement in a civil Court, and further by the Land Courts Amendment Ordinance, 1939, by which Land Courts are constituted of a president or relieving president of a District Court or of a British Magistrate's Court, or of a Magistrate's Court dependent upon the value of the subject-matter in dispute. The interesting question as to what judgment should be given where the party upon whom the onus of proof rests satisfies one of two Judges composing a Court and fails to satisfy the other, does not form one of the grounds of the judgment of the Supreme Court and therefore is not now discussed.

2. But on the second question their Lordships are clearly of opinion that the Supreme Court are right. The matter can be disposed of by reference to two sections of the Land (Settlement of Title) Ordinance, 1928/1939, under which a new register of title was opened.

S. 43. Save as provided in this ordinance, the registration of land in the new register shall invalidate any right conflicting with such registration.

S. 66. After the completion of the settlement, rectification of the Register may be ordered by the Land Court, subject to the law as to limitation of actions, either by annulling the registration or in such other manner as the Court thinks fit where the Court is satisfied that the registration of any person in respect of any right to land has been obtained by fraud or that a right recorded in the existing registers has been omitted or incorrectly set out in the register, provided that where a person has since the settlement acquired land in good faith and for value from a registered owner the Court shall not order a rectification of the register.

The argument of the plaintiffs was shortly : "Our title is on the existing register; that constitutes a presumption in our favour; our title was "omitted" from the new register, therefore there is a presumption in favour of our right to rectification." It can only be said that so to hold would be to eliminate for practical purposes the effect of S. 43, which, as in most provisions for the registration of title, is the keystone of the whole structure. Until the register is rectified the old title fails; and the register can only be rectified by showing that the entries on it are wrongly on it by fraud or mistake. "Omitted" in S. 66 means wrongly omitted, and the onus is quite plainly upon the party seeking rectification to show that the entry which is *prima facie* right ought not to be there. In the result the Land Court were wrong in placing the onus on

the defendant, who was entitled to rely on his registered title until displaced. The only possible remedy appears to be the new trial ordered by the Supreme Court. The decision of the Judges of the Land Court was obviously vitiated by their misdirection of themselves as regards onus, and in view of the fact that there is only an appeal on a question of law and that the determination of the dispute appears to involve questions of fact as well as law, no other decision could be adopted. It is, of course, unfortunate that several days of the former trial should prove wasted. Possibly the parties may succeed in arranging that some at least of the evidence already given should be read at the new trial. But in any case a new trial appears inevitable. For the above reasons their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs of the appeal to His Majesty in Council.

K.S./R.K. *Appeal dismissed.*
Solicitors for Appellant — *Bischoff & Co.*
Solicitors for Respondent —
The Treasury Solicitor.

(28) A. I. R. 1941 Privy Council 101

(*From Palestine*)

11th March 1941

VISCOUNT SANKEY, LORD ATKIN AND
LORD JUSTICE LUXMOORE

Michel Habib. Raji Ayoub and others —
Appellants

v.

Sheikh Suleiman El Taji El Farouqui
— Respondent.

Privy Council Appeal No. 30 of 1939.

(a) Contract — Breach — Penal stipulation to pay sum agreed cannot be enforced — Agreed liquidated damages when can be enforced — Stipulation held penal.

A penal stipulation to pay the sum agreed on breach of contract cannot be enforced. Agreed liquidated damages, if to be enforced, must be the result of a "genuine pre-estimate of damages." They do not include a sum fixed in terrorem covering breaches of contract of many varying degrees of importance, the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties.

[P 103 C 1]

A stipulation in the contract of sale of land that on failure to pay any of the instalments of the purchase price on due date or to pay taxes or to take the agreed part in the appointment of a surveyor, the agreed sum of £2500 should become payable as damages by the purchaser independently of his liability to pay instalments held amounted to a stipulation by way of penalty and could not be enforced.

[P 102 C 2; P 108 C 1]

(b) Contract — Contract of sale — Promise to pay purchase price in instalments amounts to payment of money.

In a contract of sale the promise to pay the purchase price in instalments amounts to the payment of the money. A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments.

[P 103 C 2]

Sir T. Strangman and Phineas Quass

— for Appellants.

Respondent Ex parte.

Lord Atkin—This is an appeal from the Supreme Court of Palestine sitting as a Court of appeal who set aside a judgment of the District Court of Jaffa in favour of the appellants, the plaintiffs in the suit, for £2500 for breach of contract. The hearing in the District Court was the result of a decision of this Board on appeal in the same case, who after judgments in the two Courts in Palestine ultimately in favour of the plaintiffs remitted the case for a further and fuller hearing. The dispute between the parties arises out of a contract in writing dated 12th November 1929, under which the appellants agreed to sell to the respondent certain land in the district of Jaffa. The purchase price was to be paid as to £200 on the signing of the agreement, when the purchasers were to be let into possession, and the balance by instalments. There was a date fixed for completion and there were various stipulations by either party, as to payment of taxes, survey of the land, proof of registration and the like. The agreement was subsequently varied by correspondence as to the date of the subsequent payments with an express stipulation that the remaining stipulations of the agreement remained in force. The purchasers paid the initial £200 on signature and went into possession; but it does not appear that they have made any further payment. There was in the agreement clause 8:

The second party (the purchaser) shall pay to the first party £2500 as agreed and liquidated damages without the necessity of notice if he commits a breach of all or part of his undertaking under this agreement.

There was a similar stipulation by the vendor in the event of any breach on his part. By the varied agreement the purchaser was to pay £400 by the end of February 1931. On 2nd March 1931, the vendors gave the purchasers written notice to pay the £400 within three days, and on 25th July 1932, delivered their statement of claim in the present action which averred the contract, averred two breaches in respect of the non-payment of taxes, and the non-pay-

ment of £400, and claimed £2500 as the agreed damages. The District Court dismissed the action on the ground that the claim as to damages did not apply to the contract as varied. This was obviously wrong and in effect the Supreme Court so held, and treating this as the only issue gave judgment for the plaintiffs. On appeal to the Privy Council, this Board affirmed the opinion of the Supreme Court so far as it went; but as it was apparent that other points raised by the purchasers had not been disposed of, remitted the case for further hearing. In their judgment attention was called to the provisions of S. 46 of the Palestine Order in Council, 1922, and to the introduction into the jurisprudence of Palestine of the provisions of the rules of the English common law and equity as there provided. It is plain that their Lordships studiously refrained from expressing any opinion as to the effect of this clause upon the issues in this action, and in this respect it would appear that one of the Judges of the Supreme Court was under a misapprehension.

The questions that remained for consideration on the new trial, and have now been decided by the Supreme Court, arise out of the provisions of Arts. 111 and 112 of the Ottoman Code of Civil Procedure. Unfortunately, disputes have arisen in this and other cases as to the correct translation of this Code which is in Turkish. Fortunately in the present case we have translations into Arabic by two of the learned Judges of the Supreme Court who were members of the appeal Court, and their Lordships are able to approach this part of the case with some confidence that the English translation of the Arabic by the court interpreter conveys the true text. There were some slight verbal differences in the Arabic translations which did not affect the substance, and for the purpose of this decision their Lordships adopt the rendering of the Senior Judge, Khaldi J.

Article 111. If it is pointed out and provided in the body of the contract that in the event of failure of any of the parties in the carrying out of what he undertook, he pays to the other party a fixed amount as damages, no greater or less should be awarded.

Article 112. The damages to be awarded for failure to carry out the undertaking which amount to payment of money, is a judgment for the interest at the rate of 1 per cent. per month in respect of the capital amount. This interest is awarded with-

out calling on the creditor to show that he suffered damage. If there is no agreement in the document (*sanad*) regarding the interest and interest is claimed in respect of the debt in the notice, interest is calculated from the date of the notice. If there is no notice, interest is calculated from the date of the statement of claim.

It is necessary now to refer to S. 46 of the Palestine Order in Council of 1922:

46. The jurisdiction of the civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November 1914, and such later Ottoman Laws as have been or may be declared to be in force by public notice, and such orders in council, ordinances and regulations as are in force in Palestine at the date of the commencement of this order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.

Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualifications as local circumstances render necessary.

The appellants contend that the case falls to be decided by the express provisions of Art. 111 of the Code being Ottoman Law in force at the material time. It is only subject thereto that the common law and doctrines of equity are directed to be in force: and there is therefore no support for the defendant's contention that the English distinction between penalty and liquidated damages has to be applied. That the stipulation as to £2500 would be considered a penalty according to English rules was admitted by the appellant's counsel. There could hardly be a plainer case. For any failure to pay any of the instalments on due date, for failure to pay taxes, to take the agreed part in the appointment of a surveyor this sum of £2500 became payable. It was the contention of counsel, and it seems correct, that the recovery of this sum left the instalments still outstanding: and that from time to time the agreed sum would be recovered as and when there was any breach. Their Lordships cannot hold that under the present system in Palestine such harsh and oppressive terms have to be enforced by the Courts. The terms of Art. 111 can be readily construed so as to afford the

Courts the means of giving relief against a merely penal stipulation. The code speaks in a legal system which does not know penalties as such: in which an agreement to pay damages must therefore be strictly enforced "no more and no less." But when the difference between penalty and liquidated damages is introduced into the legal concepts which now owing to S. 46 of the Order in Council form the jurisprudence of Palestine the terms of Art. 111 can be given a plain and just meaning. Agreed liquidated damages, if to be enforced, must be the result of a "genuine pre-estimate of damages" to use the illuminating phrase of Lord Dunedin. They do not include a sum fixed in terrorem covering breaches of contract of many varying degrees of importance the possible damages from which bear no relation to the fixed sum, and which obviously have at no time been estimated by the contracting parties. It seems right therefore to conclude that now when the code is applied to contracts, "damages" will be taken to mean actual damages, and the article will only apply to an agreement which represents "a genuine pre-estimate of damages." Where there is such an agreed sum "no more and no less" can be awarded. But if the Court applying well-known rules has to conclude that the sum agreed was a penalty, whatever it may be called in the agreement, then the penal stipulation will not be enforced. It results from what has been said that it appears more correct to say that the code must be construed in the light of the doctrines of English law rather than that the English principles relieve against the code. If there is a clear and in-frangible antinomy the code must of course prevail. On this point therefore the appeal fails.

It nevertheless remains to consider the construction of S. 112. The action has been remitted to the District Court to assess the damage caused to the appellants by the breaches alleged, and unless the plaintiffs can claim interest under the article it seems difficult to see what other damage they could establish. The view taken by the majority of the Supreme Court was apparently that the article only applied to a single obligation to pay money. It may be supposed that a simple money bond, or a promissory note would be instances. It was not considered applicable to a contract where there were reciprocal undertakings. On this point their Lordships agree with the Acting Chief Justice that the words of

the article do not appear to be as limited in this scope as appeared to the other two learned Judges. The promise to pay the purchase price in instalments is an "undertaking which amounts to the payment of money." A debt is constituted whether the price be for real or personal property, and whether it be due in one sum or in instalments: and it would appear irrelevant that there are other obligations outstanding on either side, if once it is established that a fixed sum is due and payable. It seems difficult to see why interest should be allowed on a single payment and not on instalments: or why if in fact there has been a delay in making payment; the creditor should not be compensated because there are further and other obligations outstanding. At the hearing it would appear that the respondent contended for the construction now adopted arguing that Art. 112 provided the only remedy for delay in payment; and that where it applied Art. 111 had no operation. Their Lordships do not take this view. The two articles are independent, though when it comes to assessing the actual damages the plaintiffs may have to fall back on Art. 112. What the effect may be of a suit to recover interest only and not the principal is a matter which was not discussed at the hearing, and no opinion is expressed upon it. For the reasons above given, their Lordships will humbly advise His Majesty that this appeal be dismissed. As the respondent has not appeared there will be no order respecting costs.

G.N./R.K. *Appeal dismissed.*
Solicitors for Appellants — T. L. Wilson & Co.
Respondent *Ex parte.*

(28) A. I. R. 1941 Privy Council 103
(From Supreme Court of Jamaica)
10th February 1941

VISCOUNT SANKEY, LORD ATKIN AND
LORD JUSTICE LUXMOORE

Olga Hall — Appellant
v.

Kingston and Saint Andrew Corporation
— Respondent.

Privy Council Appeal No. 4 of 1940.

(a) Public Health Law (1925), S. 89 — S. 89 has no application to corporations as such — Sub-s. (1) affords protection to persons only and not to bodies corporate or incorporate. Sub-section (1) of S. 89 affords protection to persons only and not to bodies corporate or incorporate. The actions in respect of which the required notices are to be given as a condition precedent to

their institution are actions against "any member of the Central Board or any Local Board." Therefore S. 89 has no application to the Corporation as such. [P 105 C 2; P 106 C 2]

(b) Tort—Master and servant—Injury caused by negligence of servant of corporation in discharge of his duty — Corporation is liable for damages.

A cartman who was a servant of the Corporation while driving a cart belonging to the Corporation for collecting rubbish caused injury to a man's foot:

Held that the Corporation was liable to pay damages for the negligence of its servant.

[P 106 C 2]

D. N. Pritt and Dr. C. L. Colombos —

for Appellant.

Respondent Ex parte.

Lord Justice Luxmoore. — On 19th November 1934, Olga Hall, who was then about seven years old, acting by her father as her next friend sued the Kingston and St. Andrews Corporation (hereinafter called the Corporation) for damages for personal injuries. It was alleged that the injuries were caused on 15th June 1934 by the negligent driving by one Mortimer Brown an employee of the Corporation of a cart marked K. S. A. C. No. 11, one of the wheels of which passed over and crushed the plaintiff's foot. The Corporation denied that any injury was caused by the cart because no part of it ever came in contact with the plaintiff. The Corporation also alleged that on 15th June 1934 the cart in question was being driven by Mortimer Brown on behalf of the Council of the Corporation under and in obedience to and in execution of duties imposed on the Council by S. 22, sub.s. (2) (a) of the Public Health Law, 1925, of Jamaica and that the cart was the property of the Council and Mortimer Brown was the servant of the Council. The Corporation consequently claimed that the action was improperly constituted and that the Council of the Corporation and not the Corporation was the proper defendant. The Corporation further claimed that if the action was maintainable the Corporation was acting pursuant to and in execution of the duties created by S. 22, sub.s. (2) (a) of the Public Health Law, 1925, and that the action was barred by the provisions of S. 89, sub.ss. (1) and (2) of that law in that no proper notice of action was given and the amount of damages claimed was not specified and the action was not commenced within three months after the alleged accident.

The action was tried before Seton J. sitting with a jury. Five questions were left to the jury, viz., (1) Was the plaintiff

injured by a cart running over her foot? If so, (2) was the cart driven by Mortimer Brown? If so, (3) was the injury caused by the negligent driving of the cart? If so, (4) was the cart at the time of the accident engaged exclusively in the collection and removal of sweepings, rubbish, refuse, night-soil or other waste matter from private premises or public places? (5) Damages (i) Special, (ii) General.

The jury answered the first three questions in the affirmative and the fourth question in the negative and fixed the special damages at £8 19s. 6d. and the general damages at £300. Seton J. accordingly on 19th June 1936 entered judgment for the plaintiff for £308 19s. 6d. with costs. The Corporation appealed from this judgment to the Court of appeal of the Supreme Court of Judicature in Jamaica (hereinafter called the Court of appeal). The material grounds on which this was based were (1) that the answer in the negative by the jury to question No. 4 was against the weight of evidence and was perverse. (2) That the driver of the cart which was alleged to have occasioned the injuries was at the material time engaged in using the cart to remove rubbish pursuant to and in performance of the Public Health Law, 1925, S. 22, and consequently (a) the action was brought out of time having regard to S. 89 (2) of the said law; (b) the notice of action was bad in that it did not state the amount of damages claimed as required by S. 89 (1) and (c) the Corporation was not the proper defendant.

The appeal was heard by Sir Robert Furness C. J. and Sherlock J. On 19th October 1936, they set aside the jury's answer to question No. 4 holding that a negative answer was wholly irreconcilable with the evidence and substituted for it an answer in the affirmative. The Court of appeal in the course of its judgment stated:

In our view the only inference to be drawn from the answer to question No. 4 which we have substituted for that of the jury is that at the time of the accident Brown was using the cart in pursuance of duties imposed by the Public Health Law, 1925. It follows that whether his employer should properly be said to have been the Corporation or should properly be said to have been the Council of the Corporation the employer's rights and liabilities are governed by the Public Health Law, 1925.

The Court of appeal also held that the action was out of time because whether the Corporation or the Council of the Corporation was the proper defendant the requirements of S. 89 (1) and (2) had not been fulfilled. The Court of appeal accordingly set aside the judgment of the Court below

and entered judgment for the defendant with costs except as to the costs of a particular summons in the action which were awarded to the plaintiff and directed to be set off against the general costs of the action. On 25th July 1939 the plaintiff obtained special leave from His Majesty in Council to appeal in forma pauperis from the judgment of the Court of appeal.

The case for the appellant was filed in due course but no case has been filed on behalf of the Corporation nor did the Corporation appear at the hearing of the plaintiff's appeal before their Lordships. Counsel for the plaintiff contended (1) that the Court of appeal erred in substituting its finding for that of the jury on a pure question of fact. (2) That the question of the ownership of the cart and the uses to which it was put and whether it belonged to the Corporation or the Council of the Corporation was a mere technicality as the Council of the Corporation is part of the Corporation and the Corporation is liable for the acts of its servants and agents. (3) That the plaintiff's action was properly instituted in accordance with the provisions of S. 223 of the Kingston and St. Andrew Corporation Law, 1931. Their Lordships have considered the note made by Seton J. of the evidence adduced at the trial with regard to the user of the cart in question at the date when the accident to the plaintiff occurred. The material evidence with regard to these matters was given by the driver Mortimer Brown and by Chief Sanitary Inspector Codling. Mortimer Brown stated in his evidence in chief that he was a cartman. He said :

I drive a garbage cart. Mr. Codling is my master. He is Chief Sanitary Inspector of St. Andrew. When garbage is collected I dump it. I drive cart No. 11. I have been doing this work nearly four years. I have never done any work but this under Mr. Codling. The Cart is specially constructed for rubbish. On Friday, 15th June 1934, I was collecting garbage.

In cross-examination he said : "I am still employed by the Corporation. Corporation carts are marked K. S. A. C. I still drive No. 11." Mr. Codling, the Chief Sanitary Inspector, said in his evidence in chief:

Brown drives cart No. 11. No. 11 is used solely for sanitary purposes, i. e., picking up household rubbish. It has never been used for any other purpose. On 15th June, 1934, I can say cart No. 11 was solely being used for that purpose.

In his cross-examination he said:

The Corporation pay Brown. They pay me too. This cart (meaning cart No. 11) is the property of the Corporation. The carts are all numbered . . . they are all marked K. S. A. C.

Mr. Pritt on behalf of the appellant urged that the jury were entitled to ignore the whole of this evidence because they refused to accept either Brown or Codling as truthful witnesses in their denials that the injuries to the plaintiff were caused by the cart driven by Brown. Their Lordships are unable to accept this argument and find themselves in complete agreement with the opinion expressed by Sir Robert Furness C. J. and Sherlock J. that a negative answer to question 4 is wholly irreconcilable with the evidence and they are satisfied that the Court of appeal had ample jurisdiction to correct the answer to question 4 in the manner already mentioned. The Court of appeal held that it was unnecessary to decide whether the Corporation or the Council of the Corporation was the proper defendant to the action because the non-compliance by the plaintiff with the requirements of S. 89 of the Public Health Law, 1925, afforded a complete answer to the plaintiff's claim. Section 89 (1) provides that no action shall be instituted against any member of the Central Board or any Local Board or a Health Officer or any Sanitary Inspector or any Assistant or other employee of the Central Board or any Local Board in respect of any act done in pursuance of execution or intended execution of the Public Health Law, 1925, until the expiration of one month's notice in writing of such intended action given by the person complaining to the person concerned specifying the act or injury complained of and the amount of damages claimed therefor.

Sub-section 2 of the same section provides that any action for anything done in pursuance or execution or intended execution of that law

shall be commenced within three months after the thing done and not otherwise or in the case of a continuous injury or damages within six months next ensuing after the cessation thereof.

Sub-section (1) on its true construction appears to their Lordships to afford protection to persons only and not to bodies corporate or incorporate. The actions in respect of which the required notices are to be given as a condition precedent to their institution are actions against "any member of the Central Board or any Local Board." The word member is qualified in each case by the reference to the Central Board and also to the Local Board. Further the notice required is to be given to the person concerned. The Central Board is incorporated under the name of the Central Board of Health by S. 3 of the Public Health Law, 1925. By S. 7 of the same law it is provided that the Council of the Kingston and St. Andrew Corporation shall be the Local Board for the Parishes of Kingston and St. Andrew while in other parishes the

parochial boards of such parishes are to be the local boards. Section 22 provides so far as is material to be stated that every local board shall provide and maintain an efficient service of sanitary carts and scavengers . . . for the collection and removal of sweepings, rubbish, refuse, night-soil and other waste matter from private and public places. At all material times the Council of the Kingston and St. Andrew Corporation was not a corporation nor is it now incorporated. It was at all material times a body set up by the Kingston and St. Andrew Corporation Law, 1931. By this law (S. 4, sub-s. 1) the inhabitants of the Parish of Kingston and the Parish of St. Andrew are declared to be a Municipal Corporation bearing the corporate name of the Kingston and St. Andrew Corporation and by such name is given perpetual succession. By S. 9 (1) of the same law it was provided that the Corporation should be capable of acting by the Council and that the Council should exercise all powers vested in the Corporation or the Council by this law or otherwise. Sub-section (2) provided that the Council should consist of the Mayor, Aldermen and Councillors. By a fasciculus of clauses contained in Part VII of the same law under the heading Rates and numbered 107-111 inclusive it is provided that rates are to be raised, levied, collected and paid to the Council and paid over to the town clerk for the purposes of the corporation. By S. 192 the funds or money belonging to or payable to or collected by the Council under and by virtue of this or any other law shall after due provision has been made with the approval of the Governor in Privy Council for interest and sinking fund on any loans for which the Council is liable or responsible under this or any law be applicable towards payment of . . . (i) the disposal and destruction of street and house refuse and rubbish, (j) the maintenance and preservation of all corporate property, (k) the payment of any sums payable by the Council under any judgment of any Court of law, and (l) generally towards the payment of all expenses of and incidental to the carrying out of the provisions of this law and of all works and matters incidental thereto. Section 223 provides that

all actions and proceedings to be commenced against the Corporation or any person or persons for anything done in pursuance or intended pursuance of this law shall be commenced within six months after the act committed and not otherwise and notice in writing of such action or proceedings and of the cause thereof shall be given to the Council member

or person against whom it is intended to bring such action or proceedings one calendar month at least before the commencement thereof.

For the reasons already stated their Lordships are of opinion that S. 89 has no application to the Corporation as such and that the Court of appeal was in error in holding that the action was barred by that section although admittedly no notice in accordance with its requirements was given on behalf of the plaintiff before the action was instituted and the writ was issued more than three months after the date when the injuries were inflicted. Further, their Lordships are satisfied that the evidence proves conclusively that the cart K. S. A. C. No. 11 was the property of the Corporation and that its driver Mortimer Brown was the servant of the Corporation and that the cart in question was being driven when the accident occurred in circumstances which rendered the Corporation and not the Council of the Corporation liable for the injury caused by the negligence of their servant Brown. Section 223 of the Kingston and St. Andrew Corporation Law, 1931, does not afford any protection to the Corporation because there has been no disregard of any of its provisions. For these reasons their Lordships are of opinion that the plaintiff is entitled to recover the £308 19s. 6d. awarded to her by the jury and for which judgment was entered in her favour by Seton J. They have therefore humbly advised His Majesty in Council that this appeal should be allowed, with the costs of the appeal to the Court of appeal, the judgment of Seton J. restored, and that such costs of this appeal as are proper to be awarded to the plaintiff suing in forma pauperis should be ordered to be paid to her by the respondent corporation.

K.S./R.K. *Appeal allowed.*
Solicitors for Appellant—Hy. S. L. Polak & Co.
Respondent *Ex parte.*

(28) A. I. R. 1941 Privy Council 106
(From Supreme Court of Trinidad
and Tobago)

12th March 1941

LORD ROMER, LORD JUSTICE LUXMOORE
AND LORD JUSTICE GODDARD

Ernest Hugh Canning and others —
Appellants

v.

Soobran Partap and another —
Respondents.

Privy Council Appeal No. 77 of 1939.

(a) Company — Winding up — Onerous contract with creditor — Company unable to carry on its business and to pay its debts—It is just and equitable to wind it up.

Where in consequence of an onerous contract with a creditor the company loses its identity and the creditor becomes de facto the company with a power to bring it to an end whenever it suited him and in accordance with the stipulations of the contract seizes the machinery and plant of the company with the result that the company is unable to carry on its business and to pay its debts it is just and equitable to wind up the company.

[P 109 C 1, 2]

(b) Privy Council—Leave to appeal to—No legal principle involved—Concurrent findings of fact by lower Courts — Leave to appeal should not be granted.

A case in which no legal principle is involved and in which there are concurrent findings of fact by the lower Courts does not warrant the grant of leave to appeal to His Majesty in Council.

[P 109 C 2]

Ch. Harman and F. M. Winterbotham —
for Appellants.

H. Wynn Parry and Cecil Turner —
for Respondents.

Lord Justice Luxmoore.—On 21st October 1938 Boland J. ordered that the New Dome Oil Fields Ltd. (hereinafter called "the company") should be wound up by the Supreme Court of Trinidad and Tobago under the provisions of the Companies Ordinance Chap. 180. This order was made upon a petition presented by leave of the Court by Soobran Partap and Ramessar Partap on 9th September 1938. On 9th November 1938 Manoel Joaquim de Silva, a creditor of the company who had opposed the making of the winding-up order appealed against such order, and on 23rd November 1938 the Full Court of the Supreme Court of Trinidad and Tobago dismissed this appeal on the ground that it was incompetent because de Silva had intervened in the winding-up proceedings subsequent to the date of the winding-up order. On 14th November 1938 Philomena Fernandez who claimed to be a creditor of the company and as such had opposed the making of the winding-up order gave notice of appeal against such order while on 6th December 1938 Ernest Hugh Canning and Jacinto Francisco Xavier who respectively claimed to be creditors of the company and had also opposed the making of the winding-up order gave separate notices of appeal against that order. On 17th December the Full Court of the Supreme Court of Trinidad and Tobago dismissed these appeals. On 17th January 1939 Philomena Fernandez Ernest Hugh Canning and Jacinto Francisco Xavier (hereinafter called "the appellants") obtained conditional leave to appeal to His Majesty

the King in Council and on 16th May 1939 final leave to appeal as aforesaid was obtained.

The material facts are as follows: The company was incorporated as a private company under the Companies Ordinance Chap. 180 on 3rd May 1930. The nominal capital of the company is \$100,000 of which \$38,975 was stated to have been issued as paid up or credited as paid up but no information is to be found in the documents nor were counsel able to give any information at the hearing before this Board with regard to the number if any of the shares which had been issued for cash. The main object for which the company was established was to take over as a going concern the oil mining lease and operations including machinery and plant and other implements and tools used in such mining operations which were then vested in the Administrator-General of the Colony of Trinidad and Tobago as the representative of Alfred Ralph Sammy deceased who carried on business under the style of the Dome Oil Fields. The property taken over by the company included two leases dated respectively 18th February 1928 whereby certain oil petroleum mines and minerals were demised to the said Alfred Ralph Sammy for the respective terms of 21 years from 18th February 1928 subject to the payments of the rents and royalties and to the conditions and stipulations therein respectively mentioned. Each of the said leases reserved a power of re-entry if an assign of the said A. R. Sammy being a corporation should go into liquidation whether voluntary or compulsory except for the purpose of reconstruction or amalgamation. The lessors who granted the leases were Moorali Dar, the said Soobran Partap Sahoodar and Ramessar Partap. Both Moorali Dar and Sahoodar were dead before the petition for winding-up of the company was presented and at the date of such presentation Soobran Partap was the legal personal representative of each of such deceased persons. The respective properties comprised in the said leases were duly assigned to and vested in the company for all the unexpired residues of the respective terms originally created. It is admitted that after the acquisition of the leasehold properties the company was without funds to enable it to carry on the undertaking and consequently on 21st May 1930 the company borrowed \$40,000 from the said de Silva.

The terms of the loan appear to have been extremely onerous, for the company

gave as security therefor a specific charge upon (a) the unexpired terms under the leases acquired by it, (b) the oil boring and other machinery then affixed to the leasehold properties and (c) a debenture securing to de Silva the repayment of the \$40,000 without interest and charging by way of floating security the undertaking of the company and all its assets. The fact that no interest on the \$40,000 was secured by the debenture is explained by the fact that as a term of the loan the company agreed to pay de Silva a bonus by way of royalty on the oil won from the leasehold properties in addition to an annual sum of \$12,000 during the residue of the respective terms created by the leases. The company also covenanted to deposit as its Bankers in the joint names of the company and de Silva a sum equal to 4 per cent. of the gross proceeds of the sale of all minerals won from the demised premises and that any moneys for the time being standing to the credit of this account should be applied from time to time at the option of de Silva in repayment to the extent required by him of the \$40,000 or on account of any other moneys secured to de Silva in respect of his loan. At the same time de Silva and his assigns were appointed to be receiver or receivers of the company's business. It is plain that from the date of this loan the company was completely under the control of de Silva. He admittedly remained in the position of receiver of the company's business until the order for winding-up was made. In June 1934 there was a variation with the concurrence of de Silva of the royalties payable to the lessors under the leases of 18th February 1928, but the details of this variation are immaterial. de Silva has never since his appointment as receiver filed any abstract of his receipts and payments as prescribed by S. 95 (1) of the Companies Ordinance, Chapter 180.

On 21st July 1938 de Silva seized under a so-called power to distrain conferred on him by his agreement with the company all the machinery, engines, plant and equipment on the leasehold properties and gave notice of his intention to sell the same by public auction on 15th September 1938. It was this notice which caused Soobran Partap and Ramessar Partap to apply to the Supreme Court for leave to present a petition for the compulsory winding-up of the company. When this application was made all royalties due to Soobran Partap and Ramessar Partap had been paid and consequently there

was no debt directly due and payable to either of them but each was a prospective and contingent creditor in respect of the future rents and royalties falling due for payment under the leases. The Supreme Court was satisfied that a *prima facie* case for winding-up had been established and gave leave for the presentation of a petition for that purpose. The petition was presented on 9th September 1938. It alleged among other things that having regard to the seizure by de Silva of the company's plant and equipment the company was not in a position to carry on its business, that six judgments had been obtained against the company particulars of which were set out in the petition, that the company was unable to pay its debts and that it was just and equitable that it should be wound up. The hearing of the petition was fixed for 22nd September 1938. Some six companies and persons gave notice of their intention to appear at the hearing. One of these viz., the Neal & Massy Engineering Company claiming to be a creditor for \$198.69 stated in its notice that it intended to support the petition. This debt was paid by de Silva a few days before the hearing. The other five did not state whether they were creditors or contributories but stated that they opposed the petition. At the hearing the company and de Silva appeared by the same counsel and the appellants also appeared by counsel and applied for and obtained leave to oppose the petition. The petition was verified by the usual affidavit in the statutory form deposed to by Soobran Partap. de Silva swore an affidavit in reply. In this affidavit he stated that four of the six judgments referred to in the petition had already been satisfied and that the remaining two would be satisfied directly after taxation of the costs referred to in such judgments and that apart from the two last mentioned judgments he, de Silva, was the only other creditor of the company. He further stated that the petition was not presented bona fide. Both de Silva and Soobran Partap were cross-examined upon their affidavits. de Silva's evidence was certainly remarkable in the light of his relationship to the company. He stated that he had paid the last royalties due to the petitioners with his own cheque because the company had no funds on the date of payment. He said he had been repaid this amount by the company but he was unable to say whether the repayment to him was made by cheque or not. He was unable to say what the

company owed to him but that he had distrained upon the company's assets for about \$90,000 and that the company had not got the money to pay him at present. He was unable to state what the company owed to Pihlomena Fernandez. He also stated that he did not know if the company had as much as \$10 in its banking account although as receiver he received all moneys and signed all cheques. The following significant passages appear in Boland J's. note of de Silva's cross-examination :

I do not know if the company can pay its debts. The company has not got the money to pay me regularly. I am financing the company. I loaned the company \$40,000 in 1930. My debt is now, more than \$94,000. The \$94,000 is in addition to the \$40,000. I am not pressing for the money. I never made any demand for my money. I distrained on everything." I financed the dome. I do not know if they need the finance. If I choose to give them the money I do. If I choose to pay a creditor I pay. They can sue and can get the money. Company owes Xavier for royalty and Mrs. Fernandez too, I suppose for a good many years. They came after me. I have not paid them. The company will be able to pay Xavier if they sell. I do not know how much cash they have." "I cannot tell if this company owes me \$300,000. I do not know how much. It is not \$1,000,000. It may be more than \$300,000 or it may be less.

But perhaps the most remarkable statement made by de Silva was that he did not distrain upon the company's assets with the intention of selling those assets but in order to induce the people with whom he stated he was negotiating for the reconstruction of the company to come forward. He stated that the negotiations were on behalf of a new American company but he did not know its name or the name of the persons with whom the negotiations were taking place. He also said: "Apparently the negotiations have ceased" and that "in view of the winding-up petition I think those foreign people have gone."

In the light of this evidence Boland J., found that de Silva was de facto the company and had power to bring it to an end whenever it suited him; that the company's identity was gone and that people having transactions with the company would in fact be dependent entirely upon de Silva without realizing it beforehand. These findings appear to their Lordships to be fully justified by the evidence. Clearly the company is unable to pay its debts and having regard to the seizure by de Silva of its machinery and plant it is also unable to carry on its business. It is impossible to suppose in such circumstances that any independent creditor could have any good

reason for wishing that the company should not be wound up. Boland J. after hearing the creditors who opposed the petition rejected the suggestion that the petition had not been presented in good faith and had no hesitation in exercising his discretion in favour of the winding-up of the company by the Court on the ground that it was just and equitable so to do. The full Court of the Supreme Court of Trinidad and Tobago expressed their opinion that there were ample grounds upon which Boland J., could and did exercise his discretion and dismissed the appeal with costs. The Chief Justice who delivered the judgment of the Court said that "if ever there was a case in which a winding-up order should have been made we consider this to be one." Their Lordships find themselves in complete agreement with the judgment of Boland J., and of the full Court. In their opinion, the case is one in which no legal principle is involved, and in view of the concurrent findings of fact did not warrant the grant of leave to appeal to His Majesty in Council. Their Lordships will humbly advise His Majesty that this appeal should be dismissed and that the appellants should be ordered to pay to the surviving respondent his costs of the appeal.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellants — *Druces & Atles.*

Solicitors for Respondents —

Maples, Teesdale & Co.

(28) A. I. R. 1941 Privy Council 109

(From New Zealand)

3rd April 1941

THE LORD CHANCELLOR, LORDS
THANKERTON, WRIGHT AND PORTER
Hoani Te Heuheu Tukino — Appellant

v.

Aotea District Maori Land Board —
Respondent.

Privy Council Appeal No. 95 of 1939.

(a) Interpretation of statutes—Court's duty to enforce law as enacted — It cannot question Legislature's policy.

It is not open to the Court to go behind what has been enacted by the Legislature, and to enquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. The Court must accept the enactment as the law unless and until the Legislature itself alters such enactment, on being persuaded of its error. The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination : (1893) A C 104, *Rel. on.*

[P 112 C 1, 2]

(b) Act of State — Treaty of cession of all sovereign rights — Rights conferred by treaty cannot be enforced in Court except so far as they are incorporated in municipal law.

When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. Any rights purporting to be conferred by a treaty of a complete cession of all the rights and powers of sovereignty by the ceding State on the sovereign or individuals cannot be enforced in the Courts except in so far as they have been incorporated in the municipal law: ('24) 11 A I R 1924 P C 216, *Rel. on*. [P 113 C 1]

M. H. Hamson (N. Z. Bar), H. L. Parker and James Christie — for Appellant.

A. T. Denning and J. Pennyquick —
for Respondent.

The Lord Chancellor. — This is an appeal from an order and judgment of the Court of appeal of New Zealand, dated 22nd October 1938, which dismissed an appeal from the judgment of the Supreme Court of New Zealand (Smith J.), dated 2nd December 1937, whereby judgment was entered for the defendant, the present respondent board. The appellant is the Chief of the Ngatituwharetoa, a Maori tribe, whose members own lands in New Zealand, which were charged by virtue of S. 14, Native Purposes Act, 1935, with repayment to the respondent board of a portion of a sum of £23,500 which had been paid by the latter in terms of the said section to the Egmont Company Limited. The appellant instituted the present proceedings on behalf of the tribe and as representing the owners of the said lands against the respondent board in the Supreme Court of New Zealand. Section 14, Native Purposes Act, 1935, which replaced a substantially similar provision in S. 10, New Zealand Finance Act, 1934-35, so far as here material, provided as follows:

14.—(1) The Aotea District Maori Land Board (hereinafter in this section referred to as the Board) is hereby authorized, empowered and directed to accept the offer of the Egmont Box Company Limited to release and discharge the Board and the native owners from all claims and demands of whatever kind arising out of a certain agreement made between the Tongariro Timber Company Limited and the said Egmont Box Company Limited dated 23rd October 1919 (including all amounts which the said Egmont Box Company Limited claims to be entitled to set-off against royalties payable) in respect of timber-cutting and other rights on the lands known and described in the said agreement as Western Division A and B, in consideration of a sum approved by the Native Minister to be paid to the said Egmont Box Company Limited by the Board.

(2) (A) The sum approved by the Native Minister, together with all costs and expenses incurred by

the Board in connexion with its negotiations with the Egmont Box Company Limited and incidental hereto, shall be paid by the Board out of moneys in its account, and shall be deemed to be a loan to the owners, including the Crown, of the whole lands described and referred to in a certain deed of agreement bearing date 23rd December 1908, and made between the Maniapoto-Tuwharetoa District Maori Land Board of the one part and the Tongariro Timber Company Limited of the other part, such deed being the deed entered into in pursuance of S. 37, Maori Land Laws Amendment Act 1908, excepting always, however, from such lands all such portions thereof as have been actually transferred to the Tongariro Timber Company Limited for an estate in fee simple.

(B) Upon payment of such sum as aforesaid the Board shall by virtue of this Act and as security for the repayment of such sum together with the other moneys mentioned in para. (A) hereof (all hereinafter in this section referred to as the loan-moneys) and together with interest thereon as hereinafter mentioned, be deemed to have a charge upon all the lands and the revenue therefrom referred to in para. (A) hereof, excepting any of such land or any interest therein acquired or owned by the Crown.

(8) The Board shall be entitled to charge and be paid interest at a rate not exceeding 5 per cent. per annum on the said loan-moneys until repayment thereof, such interest to be charged as from the respective dates each or any portion of such loan-money is paid out.

(9) The expenditure hereby authorized shall be deemed to be a proper investment by the Board of its funds and such investment is hereby approved.

(10) Upon payment to the Egmont Box Company Limited of the said sum, the agreement between the Tongariro Timber Company Limited and the Egmont Box Company Limited, dated 23rd October 1919, shall be deemed to be determined and cancelled, and any right, title or interest acquired thereunder by the Egmont Box Company Limited shall pass to and vest in the Board.

(11) Upon payment of the said sum to the Egmont Box Company Limited, all moneys due and owing by the Tongariro Timber Company Limited to the Egmont Box Company Limited upon any account whatsoever, including moneys which the Egmont Box Company Limited has paid or may hereafter pay in respect of its liability as guarantor under debentures issued by the Tongariro Timber Company Limited for £26,000 shall be deemed to be due and owing by the Tongariro Company Limited to the Board, and the Egmont Box Company Limited shall, at the cost of the Board, assign to it all securities it may hold for the payment of any such moneys.

In accordance with these provisions the Egmont Company made an offer to accept the sum of £23,500 and the Native Minister approved this amount and directed the respondent board to pay it, which they did upon 25th June 1935, and such sum thereupon became a charge upon the lands referred to in the agreement of 1908, other than those owned by the Crown, as provided by sub-s. (2) of S. 14. Thereafter the present proceedings were instituted by the appellant, and, as was clearly stated by his

counsel, to whom their Lordships are indebted for a full and able argument, the whole purpose of the proceedings is to obviate the statutory charge imposed upon the lands of the native owners by the Act of 1935, and it is sought to attain that end by one of the two alternative contentions maintained before the board. Counsel also stated that the native owners took the view that the Act of 1935 imposed a liability to the Egmont Company for which there was no justification, and their Lordships note that Smith J., who tried the case, says in his judgment,

Although I do not think there is any doubt about the legal position, counsel for the defendant agreed with counsel for the plaintiff that the natives represented by the plaintiff had cause to feel a sense of injustice.

However, it is not within the province of this Board to criticize the policy of the Legislature; the Board's duty is to construe and apply the enactments made by the Legislature. The first contention submitted by the appellant was that relied on in the statement of claim in its final amended form, dated 2nd July 1937, viz., that the respondent board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the board had acted in breach of that duty, and that, in consequence of that breach of duty, S. 14 of the Act of 1935 had been enacted; the appellant asked for the appropriate declarations and for an order requiring the respondent board to indemnify the native owners and their lands from and against the payment of the sum of £23,500 which the board had paid to the Egmont Company, or any part thereof. The alternative contention of the appellant challenged the validity of the charge imposed by section 14 of the Act of 1935, on the ground that such legislation was ultra vires of the Legislature of New Zealand, in so much as it derogated from the rights conferred on the native owners by the Treaty of Waitangi. This contention was not raised in the pleadings or before the Supreme Court, but it was heard and decided by the Court of appeal, without objection. On the suggestion of their Lordships, counsel for the appellant has submitted an amendment to the prayer in the statement of claim in the following terms:

2. (a) For a further declaration by the Honourable Court, that so much of S. 14, Native Purposes Act, 1935, as imposes a charge on the lands of the natives is ultra vires the Legislature of New Zealand.

Counsel for the respondent board assents

to the making of the amendment, and the scope of the argument presented before their Lordships is regularized by its allowance. Before dealing with these contentions it will be convenient to give a brief outline of the events which led up to the Act of 1935. In 1908 the Maniapoto-Tuwharetoa District Maori Land Board—the predecessors of the respondent board—as authorized by S. 37, Maori Land Laws Amendment Act, 1908, on behalf of the native owners of the lands in question, entered into an agreement with the Tongariro Timber Company Limited, under which the company was to buy the timber on the lands and pay royalties in advance on account thereof, and was also to build a railway for a distance of about 40 miles through the lands within certain prescribed periods. The Tongariro Company subsequently found difficulty in carrying out its obligations and in 1914 and 1919 it made agreements with the Egmont Box Company Limited under which it obtained assistance from the Egmont Company. At the same time statutory provisions were passed, which provided that in the event of default by the Tongariro Company in its obligations to the respondent board, the rights and obligations of the Tongariro Company under its agreements with the Egmont Company were to be transferred from the Tongariro Company to the board. In 1930, owing to the defaults of the Tongariro Company, the board cancelled the agreement between them, and questions then arose between the board and the Egmont Company, the latter claiming that the Tongariro Company was indebted to it in an amount exceeding £46,000 and that the liability had been transferred to the board under the statutory provisions of 1914 and 1919.

In the hopes that a solution might be provided by negotiation, section 18, Native Land Amendment and Native Land Claims Adjustment Act, 1930, provided inter alia that the respondent board should be authorized to enter into a new contract with the Egmont Company incorporating such terms of the 1919 agreement as should be mutually agreed upon with such additional terms as should in the opinion of the respondent board, subject to the approval of the Native Minister, be fair, reasonable and equitable. If any dispute were to arise as to the terms to be included in the new agreement, the decision of the Native Minister was to be final, provided that if the Egmont Company were dissatisfied with the Native Minister's

decision it could decline to execute the proposed contract and the parties were thereupon to be left to their respective rights and obligations under the agreement of 1919. It was further provided that if no new contract was entered into under the Act, the respondent board should remain the statutory agent of the native owners with as full authority to act as if it were the legal owner of the premises. No new agreement was arrived at or executed, and thereupon S. 10, Finance Act, 1934-35, was passed which was shortly thereafter superseded by S. 14 of the Act of 1935 and the statutory charge on the lands followed, against which the appellant seeks to be indemnified by the respondent board. In his statement of claim the appellant embodies his allegation of breach of duty by the respondent board as the statutory agent of the native owners in his prayer:

(1) For a declaration by this Honourable Court that the defendant board's failure —

(a) to obtain from this Honourable Court directions as to the legal liability (if any) of the defendant board and/or the native owners aforesaid to the Egmont Box Company Limited; or in the alternative:

(b) to terminate the contract of the Egmont Box Company Limited and sue for damages was negligence and/or breach of duty.

(2) For a further declaration by this Honourable Court that the defendant board's failure to represent to the Crown that it would be wrong to make any settlement with the Egmont Box Company Limited which involved the payment of moneys to be charged on the aforesaid lands until the liability of the native owners for any of such moneys had first been determined by this Honourable Court, was negligence and/or breach of duty.

Their Lordships fully agree with the opinion of the Court of appeal on this contention of the appellant; it is not open to the Court to go behind what has been enacted by the Legislature, and to enquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. The Court must accept the enactment as the law unless and until the Legislature itself alters such enactment, on being persuaded of its error. The principle laid down in (1893) A C 104,¹ referred to by the Court of appeal, is directly applicable. Lord Hannen, in delivering the judgment of the Board, states (at page 123):

This is an absolute statement by the Legislature that there was a *seigneurie* of Mangan. Even if it could be proved that the Legislature was deceived, it would not be competent for a Court of law to dis-

regard its enactments. If a mistake has been made, the Legislature alone can correct it. The Act of Parliament has declared that there was a *seigneurie* of Mangan, and that thenceforward its tenure shall be changed into that of *franc aleu roturier*. The Courts of law cannot sit in judgment on the Legislature, but must obey and give effect to its determination.

Before the Court can accede to the appellant's claim for an indemnity against the charge imposed by S. 14 of the Act of 1935, the Court will require not only to find that the respondent board owed to the native owners the duty alleged and that it committed the breaches of that duty which are alleged, but also that the enactment of S. 14 was the reasonable and natural consequence of such breaches, and even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an enquiry by the Court of the nature prohibited by the principle of the *Labrador* decision. The appellant therefore fails in his first contention. While the appellant's first contention assumed the legislative validity of the statutory charge enacted by S. 14 of the Act of 1935, and sought a remedy by indemnification against the liability thus imposed, his alternative contention, which remains to be dealt with, challenges the power of the Legislature of New Zealand to impose such a charge on the native lands.

The appellant maintained (1) that the Treaty of Waitangi was a solemn compact defining the rights given to the Maori people in respect of their lands; (2) that the right thus acquired by the Maori people is cognizable in the Courts; (3) that such right was declared by the Imperial Act of 1852 (15 and 16 v. cap. 72) which granted a representative constitution to New Zealand; (4) that the Colonial Laws Validity Act, 1865 (28 and 29 v. cap. 63) preserves such right; that the Imperial Act of 1857 (20 and 21 v. cap. 53) which amended the above Act of 1852, did not authorize the Parliament of New Zealand to legislate in derogation of a treaty right; and (6) that the Legislature of New Zealand has recognized and adopted the treaty as part of the municipal law; and that S. 14 of the Act of 1935 derogates from the right conferred by the second article of the treaty in so much as it imposes a charge on the native lands. Article the second of the Treaty of Waitangi, which was dated 6th February 1840, was as follows:

Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed

1. (1893) 1893 A C 104 : 62 L J P C 33 : 67 L T 730, *Labrador Company v. The Queen*.

possession of their lands and estates, forests, fisheries, and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

Under Article 1 there had been a complete cession of all the rights and powers of sovereignty of the Chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarized by Lord Dunedin in delivering the judgment of this Board in the *Gwalior case*, 51 I A 357² at p. 360, in these words:

When a territory is acquired by a sovereign State for the first time that is an act of State. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognized ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal Courts established by the new sovereign only such rights as that sovereign has, through his officers, recognized. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal Courts. The right to enforce remains only with the high contracting parties. This is made quite clear by Lord Atkinson when citing the *Pongoland case of Cook v. Sprigg*,³ he says (42 I A 229⁴ at p. 268): 'It was held that the annexation of territory made an act of State and that any obligation assumed under the treaty with the ceding State either to the sovereign or to the individuals is not one which the municipal Courts are authorised to enforce.'

So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him. He therefore refers to the Imperial Act of 1852, under which representative government was conferred on New Zealand by the creation of a legislative body called the General Assembly the powers of which,

so far as material to the present question, are provided for in Ss. 53, 72 and 73 as follows:

53. It shall be competent to the said General Assembly (except and subject as hereinafter mentioned) to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England.

72. Subject to the provisions herein contained it shall be lawful for the said General Assembly to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown in New Zealand, and all lands wherein the title of natives shall be distinguished as hereinafter mentioned, and all such other lands as are described in an Act of the Session holden in the tenth and eleventh years of Her Majesty, Chap. 112, to promote colonization in New Zealand and to authorize a loan to the New Zealand Company, as demesne lands of the Crown, shall be deemed and taken to be waste lands of the Crown within the meaning of this Act, provided always that, subject to the said provisions and until the said General Assembly shall otherwise enact, it shall be lawful for Her Majesty to regulate such sale, letting, disposal and occupation by instructions to be issued under the signet and royal sign manual.

73. It shall not be lawful for any person other than Her Majesty, Her Heirs and Successors, to purchase or in anywise acquire or accept from the aboriginal natives land of or belonging to or used or occupied by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land as aforesaid; and no conveyance or transfer, or agreement for the conveyance or transfer, of any such land, either in perpetuity or for any term or period either absolutely or conditionally, and either in property or by way of lease or occupancy, and no such release or extinguishment as aforesaid shall be of any validity or effect unless the same be made to, or entered into with, and accepted by Her Majesty, Her Heirs or Successors

The appellant's contention was that the right conferred by the Waitangi Treaty was made a substantive part of the municipal law by S. 73 of this Act, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation, might have altered any right recognized or conferred by S. 73, by enacting a few months later a provision in the precise terms of S. 14, New Zealand Act of 1935. In view of this admission — which in the opinion of their Lordships was rightly made — the only ground left on which the appellant can challenge the validity of S. 14 is that the Imperial Parliament has not conferred upon the New Zealand Legislature the power to alter S. 73 of the Act of 1852. But this ground also fails, since, while S. 73 of the Act of 1852 was expressly excepted from the power of alteration and repeal of the provisions of that Act conferred by the Amending Act of 1857 (20 and 21 V., cap. 53), the Imperial Parliament passed an Act in 1862

2. ('24) 11 AIR 1924 P O 216; 82 I O 779; 48 Bom 618; 51 I A 857 (P O), *Vajesingji Joravarsingji v. Secretary of State*.

3. (1899) 1899 A O 572; 68 L J P O 144; 81 L T 281; 15 T L R 515.

4. ('15) 2 A I R 1915 P C 59; 80 I O 303; 39 Bom 625; 42 I A 229 (P O), *Secretary of State v. Bai Rajbal*.

(25 and 26 V. cap. 48) which enabled the Assembly to repeal S. 73 of the Act of 1852 and provided that no enactment of the Assembly should be invalid because of repugnancy to S. 73. If it were needed, the provisions of the Colonial Laws Validity Act 1865 (28 and 29 V. cap. 63) operate to the same effect.

If then, as appears clear, the Imperial Parliament has communicated to the New Zealand Legislature power to legislate in regard to the native lands, it necessarily follows that the New Zealand Legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, S. 73 of the Act of 1852 was repealed by the New Zealand Legislature by the Native Land Act 1873. As regards the appellant's argument that the New Zealand Legislature has recognized and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the Legislature of its power to alter or amend such a statute by later enactments.

In the opinion of their Lordships, the appellant has failed to satisfy them that the enactment of the statutory charge in S. 14 of the Act of 1935 was beyond the competency of the New Zealand Legislature, and the appeal fails on this point also. Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs and that the order and judgment of the Court of Appeal of New Zealand should be affirmed.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellant — *Coward Chance & Co.*

Solicitors for Respondent — *Biddle Thorne & Co.*

* (28) A. I. R. 1941 Privy Council 114

(*From Ontario*)

28th April 1941

LORDS ATKIN, THANKERTON AND
ROMER; LORD JUSTICE CLAUSON
AND LORD JUSTICE LUXMOORE

International Railway Co. — Appellant

v.

Niagara Parks Commission —

Respondent.

Privy Council Appeal No. 23 of 1940.

(a) Principal and agent — Agent can enter into contract on basis that he is himself to be liable to perform contract as well as his principal.

There is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal.

[P 117 C 2]

The Acts of incorporation plainly constituted a Commission as a corporation with a separate legal entity and in some at any rate of its powers it was obviously recognized that it would have contractual capacity separate from the Crown, e.g., the power to make itself responsible for the monies secured by debentures issued under the Act for it was provided that the repayment of the monies secured by the debentures may be guaranteed by the Crown. The Commission entered into an agreement "on its own behalf as well as on behalf of the Crown":

Held that the Commission was liable to be sued in the first instance under the agreement.

[P 118 C 1]

(b) Words and Phrases — "Emanation" — Use of, while referring to agent or servant is not appropriate.

The word "emanation" is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which issues or proceeds from some source" and it is commonly used to describe the physical properties of substances (e.g. radium) which give out emanations of recognizable character. It would avoid obscurity if the words agent or servant were used in preference to the inappropriate and undefined word "emanation": (1886) 17 Q B D 795, *Ref.* [P 118 C 1, 2]

* (c) Vendor and purchaser — Rights of vendor — Interest on purchase money — Purchaser getting possession of subject-matter before payment of purchase price — He must pay interest on purchase price in absence of express agreement to the contrary — This rule is not confined to cases of sale and purchase of lands but applies to all cases where specific performance would be granted by Courts of equity.

Where the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price he must in the absence of express agreement to the contrary pay interest on his purchase money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money. This principle applies not only to cases of sale and purchase of lands but applies in all cases where Courts of equity would grant specific performance. (In this case, the rule was applied to a transfer of a railway as a going concern irrespective of the fact whether the purchaser had an option of taking over the railway or is bound to do so without any option.): (1852) 3 H L C 565; (1727) 2 P Wms 410; (1807) 13 Ves 517 and (1925) A C 177, *Rel. on.*

[P 119 C 1]

D. N. Pritt and J. L. Stone — for Appellant.

C. T. Lequesne and F. Gahan — for Respondent.

Lord Justice Luxmoore. — On 29th August 1938 the International Railway Company (hereinafter called "the Appellant Company") instituted an action in the Supreme

Court of Ontario against the Niagara Parks Commission (hereinafter called "the Commission") to recover \$227,538.22 representing the unpaid balance of \$251,322.08 claimed to be due in respect of interest at 5 per cent. per annum from 1st September 1932 to 3rd June 1937 on a capital sum of \$1,057,436.00. The action was heard by Kelly J. who dismissed it and ordered the appellant company to pay the costs. The appellant company appealed from this order to the Court of appeal for Ontario. The appeal was heard by Riddell, McTague and Gillanders J.J.A. who dismissed it with costs. On 19th December 1939, McTague J.A. admitted an appeal by the appellant company to His Majesty in Council. The trial Judge dismissed the action of the appellant company on two grounds: first that the appellant company was not entitled to any interest in respect of the capital sum and second that even if the company was entitled to interest the appellant company's only remedy was by petition of right against the Crown. The Court of appeal for Ontario affirmed the decision of the trial Judge on both grounds. The appellant company submitted before this Board that the decisions of the trial Judge and of the Court of appeal for Ontario were wrong on both points. The material facts are as follows: By an Act of the Legislature of Ontario intituled "an Act respecting the Niagara Falls Park" (Statutes of Ontario 50 Vic. Chap. 13) three persons therein named who then constituted an unincorporated body known as the Board of Commissioners for Niagara Falls Park with two other persons to be appointed by the Lieutenant-Governor in Council were incorporated under the title "The Commissioners for the Queen Victoria Niagara Falls Park" for the purpose of establishing, maintaining, improving and developing certain lands selected by the Commissioners thereby constituted as a public park to be called "The Queen Victoria Niagara Falls Park." The lands referred to were approved by the Lieutenant-Governor and were by the Act last mentioned vested in the Commissioners as trustees for the Province. The Act conferred on the Commissioners the necessary powers enabling them to perform the duties thereby imposed on them, the majority of such powers being subject to the control of the Lieutenant-Governor in Council. These powers included one to raise a limited sum of money by the issue of debentures charged on the revenues of the Commissioners. It was expressly provided that the debentures

so issued might be guaranteed by the Crown by order in Council.

On 4th December 1891 an agreement was entered into between the Commissioners for the Queen Victoria Niagara Falls Park who are therein expressed to be acting "on their own behalf as well as on behalf of and with the approval of the Government of the Province of Ontario" of the first part and three gentlemen who were the promoters of the railway, the subject-matter of the agreement, and are with the company thereafter to be incorporated therein called the company of the second part. The agreement (hereinafter referred to as the 1891 agreement) contained recitals to the effect that the company desired to construct and operate an electric railway along the top of the west bank of the Niagara River; that the company intended to apply for a charter of incorporation to enable it to construct and operate the said railway and other works therein specified, and to execute effectively the engagements entered into therein on the part of the company; that the company desired to secure the rights of way to construct the said railway through and in the Queen Victoria Niagara Falls Park the property of the Commissioners, and through and over other lands of the Commissioners, and also through and over lands held or contracted for by the Commissioners under contracts with and licenses from the owners thereof respectively. By the operative part of the 1891 agreement (cl. 1) the Commissioners licensed the company to construct an electric railway in and through what is described as "the park proper," and on and over other lands of the Commissioners some of which are defined as "the chain reserve." The phrase "the park proper" is defined in the agreement to mean the Queen Victoria Niagara Falls Park. The agreement by cl. 2 requires that the company shall construct, equip and operate the railway and shall extend the same to Chippawa Creek which is not within the limits of the park proper as defined by the agreement with sufficient sidings and equipments to meet the development of traffic.

By cl. 15 the company undertook to build the railway in every respect fit for traffic not later than 1st September 1892. By cls. 16 to 19 inclusive, the company's right to operate the railway was to begin on 1st September 1892 and was to extend to a period of 40 years from that date at an annual rental of \$10,000 with an option to the company to extend the right for a further period

of 20 years at an increased rental if demanded by the Commissioners to be fixed by arbitration if the parties should be unable to agree. By cl. 26 it is provided that if at the end of the said period of 40 years, the company was unwilling to renew, or at the end of the further period of 20 years, if the company continued to hold for such further period, the company should be duly compensated by the Commissioners for their railways, equipment, machinery and other works but not in respect of any franchises for holding or operating the same, such compensation to be fixed by mutual agreement, or in case of difference, by arbitration as stated in the agreement, but the failure before the expiration of any such term, to fix or pay the compensation was not to entitle the company to retain possession meanwhile of the said railways, equipment, machinery and works. Clause 29 was as follows:

Subject always to the terms and provisions of this agreement, and to the rights of the Commissioners as the owners in fee simple of land over which the right of way in the park proper and on the chain reserve, the said railways and their equipment and the other works constructed or required under this agreement, shall upon such construction or acquisition, as the case may be, be vested in and shall be the property of the company who shall, subject as aforesaid, be entitled to operate, manage and control the same during the period or periods respectively above mentioned, it being, however, hereby declared, understood and agreed, that at the end of the said first or second periods, as the case may be, the whole of the company's said high level railway from Queenston to Chippawa, and the said low level railway, if then held by the company under this agreement, together with their equipment and the machinery and works aforesaid, including the elevators or lifts acquired or built and including also the works in Queenston and Chippawa shall become the property of the Commissioners, subject to the payment of compensation to be agreed upon or awarded as the case may be, and as is hereinbefore provided for.

On 14th April 1892, the Act referred to in the 1891 agreement was passed by the Legislature for Ontario. It is intitled "an Act to Incorporate the Niagara Falls Park and River Railway Company." The preamble contains a recital to the effect that the Commissioners of the Queen Victoria Niagara Falls Park, acting on their own behalf as well as on behalf and with the approval of the Government of the Province of Ontario, on 4th December 1891 entered into the 1891 agreement which is set out in sch. B to the Act. By s. 1 of this Act the 1891 agreement was approved and ratified and declared to be valid and binding on the parties thereto each of whom was thereby

authorized and empowered to do whatever was necessary to give effect to the substance and intention of the agreement and was thereby declared to have had power to do all acts necessary to give effect to it. By s. 2 the Niagara Falls Park and River Railway Company being the company referred to in the 1891 agreement was incorporated and by subsequent sections the necessary powers were conferred on this company to enable it to carry into effect the 1891 agreement including such powers as were necessary for the construction and operation of the railway, the purchase of lands for any of the company's purposes and the sale and conveyance of surplus lands.

The company incorporated by this Act duly acquired the necessary lands and built the railway. Subsequently the railway so constructed and the lands so acquired together with all rights and liabilities of the said company became vested in the appellant company. By a further Act of the Legislature for Ontario passed in the year 1927 (17 Geo. V. C. 24 re-enacted in the Revised Statutes for Ontario 1927 C. 81) it was provided that the body corporate, therefore, constituted by the name of the Commissioners for the Queen Victoria Falls Park should be continued and should thereafter be known as the Niagara Parks Commission and it is by this name that the Corporation was sued by the appellant company and it is herein referred to as the commission. The railway constructed under the 1891 agreement and the 1892 Act was operated by the appellant company and its predecessor in title for the period of 40 years from 1st September 1892. The option to extend its operation for a further period of 20 years was not exercised by the appellant company and the period of operation accordingly expired on 1st September 1932, but by agreement with the commission the actual operation by the appellant company did not cease until 12th September 1932. The appellant company notified the commission before 1st September 1932 of the fact that it did not desire to renew its franchise.

The commission took possession of the railway pursuant to the terms of the 1891 agreement on 12th September 1932. There was considerable delay in the appointment of arbitrators under cl. 29 of the 1891 agreement and it was not until 25th May 1935 that the arbitrators appointed thereunder made their award by a majority fixing the compensation to be paid under the 1891 agreement to the appellant company by the

commission at the capital sum of \$179,104. This sum was fixed on the basis of the scrap value of the component parts of the railway. The arbitrators did not deal with the question of interest because it had been decided by this Board in (1925) A C 177¹ that the question of interest did not fall to be dealt with in arbitration proceedings but was a matter to be decided by the Courts.

The appellant company appealed from the award of 25th May 1935 to the Court of appeal for Ontario. On 31st December 1935, the award with certain small variations was affirmed by that Court. A further appeal was made to His Majesty in Council and on 23rd April 1937 it was ordered that the appeal should be allowed and that the case should be remitted to the Court of appeal for Ontario with a direction to pronounce an order that among other things the award of the majority arbitrators should be varied by fixing the compensation to be paid to the appellant company at \$1,057,436. This Board held (*see the report of the proceedings before it, (1937) 3 ALL E R 181*,²) that there was no justification under the 1891 agreement or the 1892 Act for assessing the compensation at scrap value. Lord Macmillan who delivered the judgment of this Board said (*see p. 188*):

This is fundamental — it is a railway complete with equipment machinery and works which the company was bound to hand over to the Parks Commissioners on 1st September 1932, and not the components of a railway It could not legally if it had been possible in fact, have dismantled the railway at the end of the 40 years and tendered the broken up material to the Parks Commissioners in fulfilment of its obligation. That for which it is to be duly compensated is the same thing as that which it was bound to hand over, namely, its railway with its equipment, machinery and other works, a going concern, and not a mere collection of materials.

Lord Macmillan further said (*see p. 190*):

As the dissentient arbitrator states 'a long line of cases has approved this (i. e., the principle of reconstruction cost less depreciation) as a correct method of valuing a public utility where the value of the franchise is excluded from consideration.' It is said that the present is not a case of compulsory acquisition and that this circumstance affects the nature of the compensation payable. The company it is said is thankfully relinquishing a *damnosa hereditas*. But again it has to be remembered that the terms of transfer must be read as equally applicable to a transfer of a railway in 1952 when the company's franchise definitely expired and also to a transfer in the height of pros-

perity. If the company had been highly prosperous and had applied for and obtained an extension of its franchise to September 1952, it would on the arrival of that date have had compulsorily to relinquish, however reluctantly, its profitable undertaking to the Parks Commissioners and the same terms of transfer construed in the same way would have been applicable.

Further this Board held following the decision in (1925) A C 177¹ that the arbitrators had no power to deal with the question of interest and that the appellant company must seek enforcement of that claim outside the arbitration. As already stated, the two questions to be decided in this appeal are (1) whether the appellant company is entitled to interest on \$1,057,436 compensation fixed by this Board from 12th September 1932 until payment of the said sum, (2) whether it is competent to the appellant company if entitled to such interest to sue for its recovery in an action against the commission. Logically the second question should be decided first for if the contention of the commission which has been accepted by both the lower Courts, viz., that the appellant company's only remedy is by petition of right is correct then it matters not in these proceedings whether the answer to the first question is in the affirmative or the negative. It is to be observed that the appellant company has not purported to sue the commission as representing the Crown nor is the appellant company seeking to reach Crown property. The action is in form against the commission, a corporation created by statute with express power to sue and be sued. The action is based on a contract made by the commission on its own behalf as well as on behalf and with the approval of the Government of the Province. The contract in this form was confirmed by the Legislature (i. e., by the 1892 Act) and is declared to be "valid and binding on the parties thereto."

In their Lordships' view, the commission entered into the 1891 agreement on the express terms that it was to be liable for its fulfilment, and it is therefore unnecessary to consider further the more difficult question which would have arisen if the words "on its own behalf" had been omitted; for, there is nothing to prevent an agent from entering into a contract on the basis that he is himself to be liable to perform it as well as his principal. The words in the 1891 agreement "on its own behalf" are *prima facie* directed to separate liability when read in conjunction with the words that follow, viz., "as well as on behalf of" the Crown. Kelly J.

1. (1925) 1925 A C 177 : 94 L J P C 25 : 132 L T 401, *Toronto (City) Corporation v. Toronto Railway Corporation*.

2. ('87) 24 A I R 1937 P C 214 : 169 I O 562 : (1937) 3 ALL E R 181 : 81 S J 524, *International Railway Co. v. Niagara Parks*.

gave no weight to these words; indeed he said he did not know what effect the words "on their own behalf" might have on the contract. He went on to say that "It is plain that the defendant commission has no other capacity than that of Crown agent or servant." The Acts of incorporation plainly constitute the commission as a corporation with a separate legal entity and in some at any rate of its powers it was obviously recognized that it would have contractual capacity separate from the Crown, e. g., the power to make itself responsible for the moneys secured by debentures issued under the Act for, it is provided that the repayment of the monies secured by the debentures "may be guaranteed by the Crown." This provision would be meaningless if the commission was not to be under any liability in the first instance. The Court of appeal for Ontario also appears to have ignored these important words for, there is no reference to them in the judgment of McTague J.A. with which the other members of the Court of appeal for Ontario agreed. Kelly J. in his judgment referred to the commission not only as being the agent or servant of the Crown but also as "an emanation of the Crown." The latter phrase is also used by McTague J.A. Their Lordships are unable to appreciate the precise meaning intended to be attributed to this phrase by the Courts below. If it is intended to refer to the commission in some capacity other than that of agent or servant it is impossible to ascertain from the judgments delivered what the legal significance of that capacity may be. The word "emanation" is hardly applicable to a person or a body having a corporate capacity. Its primary meaning is "that which issues or proceeds from some source" and it is commonly used to describe the physical properties of substances (e. g. radium) which give out emanations of recognizable character. The words seem first to have been used by Day J. in (1886) 17 Q B D 795.³ In his judgment in that case Day J. said (page 801) :

The Trinity House, to my mind, is not in the position of a great officer of State. It is nothing more than an amalgamation by authority of State of a vast number of bodies having general authority over the lighthouses and beacons and buoys throughout the country for the general convenience. It is a corporation with very great powers vested in it by statute, but in no possible sense can it be deemed to represent the Crown. All the great officers of State are, if I may say so, emanations from the Crown. They are delegations by the Crown of its

own authority to particular individuals. That is not the case with the Trinity House, which has its nature and origin defined with sufficient clearness to enable us to say that at any rate it is in so sense an emanation from the Crown, nor in any way whatever a participant of any royal authority.

The learned Judge in the passage quoted seems to use the word as synonymous with servant or agent and in no other sense. Their Lordships are of opinion that it would avoid obscurity in the future if the words agent or servant were used in preference to the inappropriate and undefined word "emanation." Their Lordships are for the reasons above expressed of opinion that the appellant company's action against the commission is competent and that the commission is properly sued under the 1891 agreement. It follows therefore that the question whether interest is recoverable by the appellant company upon the compensation paid under the 1891 agreement falls to be determined. The claim of the appellant company to interest on the compensation money from the date when the commission entered into possession of the railway was in each of the Courts below as it was before this Board based upon the equitable principle applicable to cases of vendor and purchaser or quasi vendor and purchaser which requires the purchaser when completing the contract to pay interest on the amount of the purchase money from the time when the purchaser takes possession of the subject-matter of the contract.

Kelly J. refused the claim to interest because he held that the 1891 agreement was a contract with an owner of land whereby the other party agreed to construct and equip a railway on the owner's land and to deliver possession of the complete railway to the owner on a fixed day retaining only a right to be compensated. The Court of appeal for Ontario appear to have adopted this view. Their Lordships do not think that this constitutes an accurate summary of the 1891 agreement. The agreement contemplated that the appellant company would buy lands and rights over lands belonging to owners other than the Commissioners as in fact the appellant company or its predecessor did. These other lands were it is true of comparatively small value but they were the property of the appellant company and must in the events that have happened be conveyed to the commission in the appropriate manner. Further the whole of the equipment of the railway had to be handed over. Much of such equipment would not pass with the land although it formed

3. (1886) 17 Q B D 795 : 56 L J Q B 85 : 35 W R 80, *Gilbert v. Trinity House Corporation*.

part of the railway as a going concern. It is true that the 1891 agreement is not primarily an agreement for the sale of land but it can properly be described as one for the transfer of the railway as a going concern. It cannot be properly described as an agreement for the supply of work and materials.

The learned Judge appears to have thought that what he describes as the rule in (1852) 3 H L C 565⁴ applies only to cases of sale and purchase of land but this is plainly not correct. The equitable rule was established many years before the decision in (1852) 3 H L C 565⁴ which was decided in 1852. The true rule is that if in cases where Courts of equity would grant specific performance the purchaser obtains possession of the subject-matter of the contract before the payment of the purchase price he must in the absence of express agreement to the contrary pay interest on his purchase money as from the date when he gets possession until the date of payment because it would be inequitable for him to have the benefit of possession of the subject-matter of the contract and also of the purchase money. The rule was applied in 1727 to the sale of a reversionary interest not in land: see (1727) 2 P Wms 410.⁵ In 1807 it was applied to a sale of growing timber. In such a case the purchase price bears interest because the purchaser gets the benefit of the growth: see Edn. 14 of Sugden's Vendors and Purchasers at p. 691. In the same year the rule was applied to the purchase of an annuity: see (1807) 13 Ves 517.⁶ In that case the sale was under the Court and took effect from the confirmation by the Court of the Master's report. Lord Eldon held that the purchase price must bear interest from that date because the purchaser then got the annuity. Sir Samuel Romilly who was counsel for the vendor, appears from the report to have argued that the rule as to interest on purchase price applied only to sales of land but this argument was not accepted. In 1827 the rule was applied to the sale of a leasehold public house with its stock in trade as a going concern: see (1824-27) 2 Russ 170.⁷ There are no doubt many other cases to be found in the books. The most important decision however so far as the present case is concerned is to be found in (1925) A C 177¹ already mentioned. In that case Lord Cave (at p. 193) said:

The general rule under which a purchaser who takes possession is charged with interest on his

purchase money from that time until it is paid is well established and has on many occasions been applied to compulsory purchases, and their Lordships are not aware of any circumstances which would prevent that principle from applying in the present case.

One of the matters in dispute in the Toronto case was whether the Toronto Railway Corporation was entitled to interest on the compensation payable to it for its railway. The material facts were as follows: In 1891, the Toronto Corporation having agreed to take over certain State railways belonging to the Toronto Street Railway Company invited tenders for the purchase of an exclusive right to operate these railways for a period of 20 years extendible to 30 years in certain events. One of the conditions provided that at the termination of the period of operation the Toronto Corporation might take over all the real and personal property necessary to be used in connexion with working the railways at a value to be determined by arbitration. On 1st September 1891 the Toronto Corporation assigned the railway and property acquired by it from the Toronto Street Railway Company to the persons who made the successful tender, the condition above referred to being incorporated in the assignment. Shortly after the assignment the Legislature of Ontario passed a statute (55 Vic. c. 99) whereby the assignment was declared to be valid and binding upon all parties for the full period of 30 years from 1st September 1891. By the same Act the Toronto Railway Company was incorporated and empowered to take over from the successful tenderers the agreement of 1st September 1891 and all the property rights and privileges comprised therein. The statute contained a provision that if the Toronto Corporation desired to exercise the right of taking over the property necessary to be used in the working of the railway at the termination of the said period of 30 years it should give notice of its intention so to do and might at once proceed to arbitrate in the manner specified in the conditions to which reference has already been made. The Act further provided that if the award should not be effective by the date when the 30 years' term expired the Toronto Corporation might take possession of the railway and all the property and effects thereof real and personal necessary to be used in connexion with the working thereof on payment into Court either of the amount of the award if made or if not made upon paying into Court or to the company such a

4. (1852) 3 H L C 565: 88 R R 212, *Birch v. Joy*.

5. (1727) 2 P Wms 410, *Ex parte Manning*.

6. (1807) 13 Ves 517, *Twigg v. Fifield*.

7. (1824-27) 2 Russ 170: 26 R R 97, *Dakin v. Cope*.

sum as a Judge of the High Court of Justice of Ontario might order.

The Toronto Railway Company took over the railway and its property and carried on the undertaking during the whole of the period of 30 years. The Toronto Corporation gave notice of its intention to take over the railway and its property but on the expiration of the 30 years' period the arbitration for fixing the compensation payable to the Toronto Railway Company had not been concluded. An application was made to the Court when an order was made giving the Toronto Corporation the right to take possession of the railway and its property on payment to the Toronto Railway Company of \$10,00,000 and into Court of \$500,000 to abide the event of the arbitration. This order was complied with on 31st August 1921 when the Toronto Corporation took possession of the railway and its property. On 30th January 1923 a majority of the arbitrators awarded that the value of the Toronto Railway Company's railway was \$11,188,500. There was considerable litigation in relation to the award and there was ultimately an appeal to His Majesty in Council. The arbitrators had awarded to the Toronto Railway Company interest upon the \$11,188,500 from the date when the railway was taken over to the date of the award. When the matter was before the Court of Appeal for Ontario, the Court varied the award by striking out among other things the allowance of interest on the \$11,188,500 on the ground that though it was equitable that interest should be paid from the time of taking possession there was no warrant for including it in the award.

The only difference between the facts of the *Toronto case*¹ and the present is that in the former case the corporation had an option of taking over the railway at the end of the franchise period, while in the present case there is no option the commission being bound to take over the railway when the franchise period expired. Kelly J. sought to distinguish the *Toronto case*¹ from the present solely by reason of the existence of the option. The Court of Appeal for Ontario does not appear to have accepted this view, for McTague J.A. said in his judgment that it seems quite clear that the equitable rule as to interest applies in cases involving the sale of lands which include equipment and buildings all as part of a railway undertaking and he cites the *Toronto case*¹ in support of this opinion. Their Lordships are of opinion that the present case cannot pro-

perly be distinguished from the *Toronto case*¹ and their Lordships' opinion (as stated by Lord Cave), in regard to the operation of the general rule to which their Lordships in that case referred and ought to have been followed. For these reasons their Lordships are of opinion that the appeal of the appellant company should be allowed and the judgments of Kelly J. and the Court of Appeal for Ontario discharged, and that judgment should be entered for the appellant company for a sum equivalent to interest at 5 per cent. on the sum of \$1,057,436 from 12th September 1932 to 3rd June 1937 credit being given by the appellant company for the sum of \$23,783.86 already paid by the commission in respect of interest and that the commission should pay to the appellant company the costs of this appeal as well as the costs of the action and the costs of the appeal to the Court of Appeal for Ontario. Their Lordships will humbly advise His Majesty accordingly.

K.S./R.K.

Appeal allowed.

Solicitors for Appellant — *Blake & Redden.*

Solicitors for Respondent — *Gard Lyell & Co.*

* * (28) A. I. R. 1941 Privy Council 120

[From Lahore : ('40) 27 A I R
1940 Lah 113 (S B)]

4th July 1941

LORDS ATKIN, RUSSELL OF KILLOWEN
AND ROMER; SIR SIDNEY ROWLATT
AND SIR GEORGE RANKIN

*Commissioner of Income-tax, Punjab,
North-West Frontier and Delhi Pro-
vinces, Lahore — Appellant*

v.

*Dewan Bahadur Dewan Krishna
Kishore, Rais, Lahore — Respondent.*

Privy Council Appeal No. 44 of 1940.

(a) Hindu law — Partition — Mere separate living by one of brothers does not import division.

The mere fact that one of the brothers lives separately from the other would not necessarily import division in any sense. [P 122 C 2]

* * (b) Income-tax Act (1922), S. 9 — "Owner" — Holder of impartible estate receiving income from house property is not owner of property — Hence income is not assessable under Sec. 9 : I L R (1939) Bom 284 = ('39) 26 A I R 1939 Bom 195 = 182 I C 712, *OVERRULED*.

Where in a family governed by the Mitakshara, by custom the rule of primogeniture controls the devolution of impartible property, the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom ; hence the estate retains its character of joint family property and devolves by the gene-

ral law upon that person who, being in fact and in law joint in respect of the estate, is also the senior member in the senior line. Hence a holder of the estate receiving income from house property cannot be said to be the owner of such property. It is the joint family that is the owner and therefore he cannot be assessed as an individual in respect of such income under S. 9: I L R (1939) Bom 284 = ('39) 26 A I R 1939 Bom 195=182 I C 712, *OVERRULED*; ('21) 8 A I R 1921 P C 62 and ('32) 19 A I R 1932 P C 216, *Rel. on.* [P 123 C 1]

(c) Privy Council — New points of law—Income-tax cases—New points of law should not be allowed to be raised for first time in Privy Council.

It is neither convenient nor conducive to accuracy that new and important points of law should be raised in income-tax cases for the first time at their Lordships' Board, or that decisions should be given upon matters not duly submitted to the High Court. [P 123 C 2]

* * (d) Income-tax Act (1922), Ss. 3, 14 (1), 55—Income from impartible estate of holder is income of individual and not income of undivided family of himself and his sons: I L R (1939) Lah 520 = ('40) 27 A I R 1940 Lah 113=187 I C 676 (S B), *REVERSED*.

The income of an impartible estate is not income of the undivided family but is the income of the present holder notwithstanding that he has sons from whom he is not divided. The facts that the son's right to maintenance arises out of the father's possession of impartible estate and is a right to be maintained out of the estate do not make it a right of a unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income. Unity of ownership, unaccompanied by joint possession on the part of the sons or any other right of possession, would not seem to affect the character in which the income is received. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable nor can it be said that the respective chances of each son to succeed by survivorship make them all co-owners of the income with their father, or make the holder of the estate a manager on behalf of himself and them, or on behalf of a Hindu family of which he and they are some of the male members: I L R (1939) Lah 520 = ('40) 27 A I R 1940 Lah 113=187 I C 676 (S B), *REVERSED*; ('37) 24 A I R 1937 Mad 515 (F B), *Affirmed*.

[P 123 C 2; P 127 C 2; P 128 C 1]
Difference in right of members of the coparcenary to maintenance in partible property and in impartible property explained (*Obiter*): ('21) 8 A I R 1921 P C 62; ('82) 19 A I R 1932 P C 216 and ('84) 21 A I R 1934 P C 157, *Expl. Case law referred.* [P 126 C 1, 2]

J. Millard Tucker and W. Wallach —

for Appellant.

J. M. Parikh and R. Parikh — for Respondent.

Sir George Rankin — This appeal arises out of a reference made to the High Court of Lahore under S. 66, Income-tax Act (11 of 1922), in respect of the year of assessment 1937-38. The assessee is Dewan Bahadur Dewan Krishna Kishore. His family is governed by the Mitakshara but by custom the

rule of primogeniture controls the devolution of the impartible property in the Punjab to which this appeal relates. He is the present holder of the impartible estate having succeeded as the eldest son of the previous holder. He has a younger brother who established against him in arbitration proceedings a right to maintenance which has now been fixed at rupees 600 per month. He has also four sons who live with him, are maintained by him, and are with him joint and undivided members of a Hindu family. He has certain personal and individual income chargeable to tax as well as income which is not taxable being derived from a jagir. No question now arises as to these classes of income. The problem laid before the High Court for solution has reference only to the income which is derived from the impartible estate and the question is confined to this: whether in respect of that income the assessee is chargeable as an individual. The contention of the assessee is that such income is only chargeable as the income of a Hindu undivided family of which he is the karta or managing member. If so, less super-tax is payable upon it, the Hindu family, as the law stood in the year of assessment, being favourably treated as regards the graduation of the tax. The question as framed by the Commissioner of Income-tax, Punjab, North-West Frontier and Delhi Provinces, who is appellant before the Board, was in these terms:

Whether the income of the impartible estate to which the assessee has succeeded by rule of primogeniture prevailing in his family governed by the Mitakshara is chargeable in his hands in the status of "individual" the assessee being the head of the family consisting of himself and his sons?

A second question framed was merely formal and consequential: it asked whether if the income was chargeable as his individual income, his other "personal" income is to be "clubbed together" with it for a combined assessment?

The sections of the Act to which the question directly refers are Ss. 9 and 55 which in language almost, but not quite, parallel impose the tax and the additional duty or super-tax. Section 55 prescribes that there shall be charged an additional duty in respect of the total income of the previous year, "of every individual, Hindu undivided family, company, unregistered firm or other association of individuals not being a registered firm." The differences of wording in Ss. 9 and 55 though important for some purposes are not significant for the present pur-

pose. The opening words of S. 9 and sub-sec. 1 of S. 14, however, are as follows :

9 (1). The tax shall be payable by the assessee under the head "property" in respect of the bona fide annual value of the property consisting of any buildings or lands appurtenant thereto of which he is the owner

14 (1). The tax shall not be payable by an assessee in respect of any sum which he receives as a member of a Hindu undivided family.

By a decision of the High Court of Lahore given in 1932 with reference to the year of assessment, 1929-30, it was held that the income from this impartible estate was chargeable to tax as income of a Hindu undivided family; and also that the younger brother's allowance was no part of the income of the family though chargeable against the recipient as his income : 14 Lah 255.¹ This ruling was carried out until the assessment now in question came to be made for the year 1937-38. In consequence of a Madras decision, 1 L R (1937) Mad 797,² the assessee was notified by the income-tax officer in January 1938, that it was proposed to assess the income from the impartible estate as his individual income. He promptly petitioned the Commissioner to state a case "at this interlocutory stage" for the opinion of the High Court and the Commissioner did so on 6th September 1938. The result is that their Lordships have not before them any order of assessment or other formal statement in detail of income classified under the different heads mentioned in S. 6 of the Act. In the case stated the Commissioner says only that the income of the impartible estate "comprises mainly rent of property and interest." To this Dalip Singh J., in his judgment, adds: "This latter source is however small and the income consists mainly of rent from house property." There is a reference in a further passage of the judgment to "interest from securities, if any" as distinct from income arising from property and coming under S. 9 of the Act. But there is no material before their Lordships to justify them in accepting as a fact that the income of the impartible estate other than that arising from house property is interest receivable on any of the kinds of security mentioned in S. 8.

The question as framed refers to the assessee as head of "the family consisting of

himself and his sons." The maintenance paid to the younger brother is assumed to be an admissible deduction, as was held in the previous case of 1930. It may be inferred from the Commissioner's language and collected from the report of the previous case that the younger brother lives separately from the elder. This would not necessarily import division in any sense and certainly it nowhere appears that he has relinquished his right to succeed by survivorship to the estate so as to bring about a partition in respect thereof. On these matters the implications of fact and law which underlie the case as stated have not been made explicit. Their Lordships pick no quarrel on these points but desire to make it clear that they have neither occasion to examine them nor the materials for a conclusion. They proceed upon the case as stated.

The learned Judges of the High Court have rejected the claim of the Commissioner to tax the assessee as an individual upon the income of the house property under S. 9 of the Act. The ground of their decision is that "the owner" of the buildings and lands appurtenant thereto is not the assessee but the Hindu undivided family. With this reasoning their Lordships agree. They think that the learned Judges were right in refusing to follow the Bombay case wherein it was held that the words "property of which he is the owner" are to be read as meaning "of which annual value he is the owner": 1 L R (1939) Bom 284.³ However difficult it may be in some cases to apply the simple and ordinary phrase "owner of property" to the facts it is not permissible to substitute a phrase which is of dubious and noticeably different meaning. Again, the distinction between property owned by an individual Hindu and property owned by a Hindu undivided family must be made by applying the Hindu law and if the distinction in certain cases be somewhat fine and difficult to draw it is all the more necessary to keep close to the Hindu law. Their Lordships cannot accept the suggestion that because the statute to be interpreted is an Income-tax Act broader or more general notions of ownership than the Hindu law affords are to determine the matter. The Act is an Indian Act and the distinction takes its meaning from the Hindu law. Since the decision of the Board

1. ('33) 20 A I R 1933 Lah 284 : 141 I C 415 : 14 Lah 255 : 34 P L R 560, Kishen Kishore v. Commissioner of Income-tax.

2. ('37) 24 A I R 1937 Mad 515 : 168 I C 168 : 1 L R (1937) Mad 797 : (1937) 1 M L J 707 (FB), Commissioner of Income-tax, Madras v. Raja of Bobbili.

3. ('39) 26 AIR 1939 Bom 195 : 182 I C 712 : ILR (1939) Bom 284 : 41 Bom L R 282, Commissioner of Income-tax, Bombay v. Abubacker Abdur Rehman.

in 48 I A 195,⁴ it has been settled law that property though impartible may be the ancestral property of a joint family, and that in such cases the successor falls to be designated according to the ordinary rule of the Mitakshara. The concluding words of the judgment delivered on behalf of the Board by Lord Dunedin in 48 I A 195⁴ are to that effect, and in that case as well as in 59 I A 331⁵ at p. 345, which followed it, "the keynote of the position" is—not that property which is not joint property devolves by virtue of custom as though it had been joint—but that the general law regulates all beyond the custom, that the custom of impartibility does not touch the succession since the right of survivorship is not inconsistent with the custom; hence the estate retains its character of joint family property and devolves by the general law upon that person who being in fact and in law joint in respect of the estate is also the senior member in the senior line.

The birthright of the senior member to take by survivorship still remains. Nor is this right a mere spes successionis similar to that of a reversioner succeeding on the death of a Hindu widow to her husband's estate. It is a right which is capable of being renounced and surrendered.

The later cases are to the same effect. Though the co-ownership of the joint member may be "in a sense" only, carrying no present right to joint possession, if the question be whether the Hindu undivided family or the present holder is owner of the estate the answer of the Hindu law is that it is joint family property. The assessee as an individual cannot therefore be charged in respect of it under S. 9 of the Act. But their Lordships do not affirm that the family consists for this purpose solely of the assessee and his sons. This answers the main contention of the Commissioner before the High Court. On this appeal, learned counsel for the Commissioner intimated a contention that the assessee as an individual might be charged in respect of the income from house property not under S. 9 but under S. 12 which deals with "other sources"—a contention which as their Lordships understand proceeds upon the footing that the Hindu undivided family is not chargeable under S. 9 or at all; because, though it owns the property it derives no income therefrom; since the income belongs to the present

holder as an individual. No such contention is raised in the case as stated; nor has the Commissioner referred to it in the opinion which the statute requires him to give; nor was it dealt with in the High Court. Hitherto the assessments on the family would appear to have been made under S. 9 as to the house property. It is neither convenient nor conducive to accuracy that new and important points of law should be raised for the first time at their Lordships' Board, or that decisions should be given upon matters not duly submitted to the High Court. Their Lordships will therefore express no opinion as to this new line of attack. If it is persisted in, as for example by an order of assessment made in respect of income as coming under S. 12, the assessee will doubtless be able to test its legality hereafter.

The important question remains whether the income which consists of interest is income of the family or of the individual. The High Court have held in general terms—apart from the particular provisions of Ss. 8 or 9—that the income of an impartible estate is income of the family and not of the present holder. The same matter had been fully considered in the High Court of Madras in 1 L R (1937) Mad 797,² where a different conclusion was reached. It has been the subject of much argument on this appeal and their Lordships think it right to give their decision upon it, especially as they have arrived at a result which will not be affected whether the income in question be found to come under S. 8 or S. 12. In their Lordships' view the income of an impartible estate is not income of the undivided family but is the income of the present holder notwithstanding that he has sons from whom he is not divided. In its simplest form, the question is whether such interest comes to the hands of the assessee as being the person beneficially entitled to it or as being a manager on behalf of himself and others. In 50 I A 1,⁶ the last holder had out of the income accumulated considerable property moveable and immovable and the question was whether this formed an accretion to the impartible estate by reason that it had been entered in the same books of account as the estate transactions. Lord Buckmaster on behalf of the Board said:

In fact when the true position is considered there is no accretion at all. The income when

4. ('21) 8 A I R 1921 P O 62 : 60 I O 594 : 49 All 228 : 48 I A 195 (P C), Baijnath Prasad Singh v. Tej Bali Singh.

5. ('32) 19 A I R 1932 P O 216 : 138 I O 861 : 59 Cal 1399 : 59 I A 331 (P O), Shiba Prasad Singh v. Prayag Kumari Debi.

6. ('23) 10 A I R 1923 P O 59 : 77 I O 1041 : 2 Pat 319 : 50 I A 1 (P O), Jagadamba Kumari v. Wazir Narain Singh.

received is the absolute property of the owner of the impartible estate. It differs in no way from property that he might have gained by his own effort or that had come to him in circumstances entirely dissociated from the ownership of the raj. It is a strong assumption to make that the income of the property of this nature is so affected by the source from which it came that it still retains its original character.

And their Lordships went on to contrast the income of an impartible estate with that of an ordinary joint estate :

It is possible that this confusion is due to the consideration of the position of an ordinary joint family estate. In such a case the income equally with the corpus forms part of the family property and if the owner mixes his own moneys with the moneys of the family . . . his own earnings share with the property with which they are mingled the character of joint family property, but no such considerations necessarily apply to the income from impartible property.

Mr. Parikh in a learned and careful argument for the assessee contended that this language was to be explained by the fact that in the particular case before the Board the Raja had no sons, and that no maintenance was payable out of the income from the estate. But the language of the judgment seems too general to have been directed to a speciality of that particular case. It may be said perhaps that savings out of the income might be the Raja's although the income was not originally received by him as his income. But that again does not seem to be the point of the judgment. The line of decisions must be considered. The principle in 15 I A 51,⁷ that there is no coparcenary was logically extended by the second *Pittapur case*, 45 I A 148,⁸ to negative any right to maintenance in a junior member of the family save by custom :

An impartible zamindari is the creature of custom and it is of its essence that no coparcenary exists. This being so, the basis of the claim (sc. to maintenance) is gone . . . This proposition, it must be noted, does not negative the doctrine that there are members of the family entitled to maintenance in the case of an impartible zamindari. Just as the impartibility is the creature of custom so custom may and does affirm a right to maintenance in certain members of the family.

It was held, moreover, that proof of special custom would be required to extend the right beyond the sons of the last holder. This was pointedly followed by the Board in the *Jeypore case*, 24 C W N 226,⁹ and fol-

lowed again in 1927 in the *Dhalbhum case*, 54 I A 289,¹⁰ after *Bajinath's case*⁴ in 1921 had set to the doctrine of *Sartaj Kuari's case*⁷ this limit, that it applied to "presently existing rights" but not to chances of succession. The second *Pittapur case*⁸ was trenched upon in *Bajinath's case*⁴ by saying that "any observations which go to the question of maintenance apart from the question of real right may be treated as obiter dicta" but it was re-stated that the right of a junior member to maintenance was not "of the nature of a real right" as he was not "a person who was in some way an actual co-owner of the estate." In *Shiba Prasad Singh's case*⁵ the board expressly notice that the ordinary right of a junior male member to maintenance out of the joint family property is incompatible with the custom of impartibility, and include it in the reflection :

To this extent the general law of the Mitakshara has been superseded by custom, and the impartible estate though ancestral is clothed with the incidents of self-acquired and separate property. . . . Though the other rights which a coparcener acquires by birth in joint family property no longer exist, the birth right of the senior member to take by survivorship still remains.

Again in holding quite generally that moveable property cannot be incorporated with an impartible estate, the board said that "the income even of such an estate is not an accretion to the estate" and they selected for quotation a sentence in the judgment in *Jagadamba's case*,⁶ "The income when received is the absolute property of the owner of the impartible estate" adding that it does not attach to the estate as does the income of an ordinary ancestral estate attach to that estate (p. 353). The circumstance that the last holder had died childless does not seem to be the basis and turning point of these reflections.

The High Court's decision in the present case seems to have turned entirely upon a passage in the judgment of the Board delivered by Lord Blanesburgh in 61 I A 286¹¹ at p. 302. This had also been considered in the *Bobbili case*,³ but the Madras High Court did not think that it touched the present question. The question in the *Gorakhpur case*¹¹ was whether one Indarjit had succeeded by survivorship to an impartible estate. The objection taken to his son's

7. ('88) 10 All 272 : 15 I A 51 : 5 Sar 139 (P C), *Sartaj Kuari v. Deoraj Kuari*.

8. ('18) 5 AIR 1918 P C 81 : 47 I C 354 : 41 Mad 778 : 45 I A 148 (P C), *Gangadara Rama Rao Bahadur v. Raja of Pittapur*.

9. ('19) 6 A I R 1919 P C 126 : 52 I C 333 : 24 C W N 226 (P C), *Maharaja of Jeypore v. Vikrama Deo Garu*.

10. ('27) 14 A I R 1927 P C 159 : 102 I C 599 : 54 Cal 955 : 54 IA 289 (P O), *Protap Chandra Deo v. Jagadish Chandra Deo*.

11. ('34) 21 A I R 1934 P C 157 : 150 I C 545 : 56 All 468 : 61 I A 286 (P C), *Collector of Gorakhpur v. Ram Sundar Mal*.

claim was that his branch of the family had long been separated from that of the last holder. That they had long been separate in food and worship was clear enough, the common ancestor being very remote. The claimant's branch or some of its members had for many years possessed a babuai property which had been carved out of the impartible estate by a previous holder thereof. Considering whether this fact tended to show separation or jointness of the branches, the board referred to *Baijnath's case*⁴ as having negatived the doctrine that an impartible zamindari could not be in any sense joint family property. They add:

One result is at length clearly shown to be that there is now no reason why the earlier judgments of the Board should not be followed, such as, for instance, the *Challapalli case*, 27 I A 151,¹² which regarded their right to maintenance, however limited, out of an impartible estate as being based upon the joint ownership of the junior members of the family, with the result that these members holding zamindari lands for maintenance could still be considered as joint in estate with the zamindari in possession. Such was the position of the junior branch in this case under the babuai grant of dharamner.

On the strength of these observations, which they consider to contradict the previous decisions (the second *Pittapur case*⁸ and *Shiba Prasad Singh's case*⁵ in particular) the High Court of Lahore have now held that the members of the joint family have a right to maintenance which arises from their right in the property of the joint family "of which they are co-owners." They consider that the Board have negatived the view that there is no right to maintenance save such as is impressed by custom and conclude that the income of the estate cannot be said to be "the income solely of the incumbent." They say:

The members of the joint family have the right to receive maintenance from the estate and this right arises because they are owners of the estate and is not a right to maintenance from the joint family, though not from the property — as is the case of female members of a joint family. The distinction is really quite clear: in the one case the female member has a right to maintenance from the joint Hindu family but this right does not confer any right in the estate or property of the joint family: in the other case the members of the coparcenary have a right to maintenance arising from their right in the property of the joint Hindu family of which they are co-owners. It follows from this again that the income of the impartible estate cannot be said to be the income solely of the incumbent of the impartible estate, there being vested in the junior members of the

family a right to maintenance out of that income arising by reason of their right in the property and not imposed by custom upon one member of the joint Hindu family, namely, the incumbent of the impartible estate.

Before attributing these effects to the passage cited above from the *Gorakhpur case*¹¹ there is a good deal to consider. The character of the income as received by the holder of the estate was not even indirectly before the board, and if it had been, there is all the difference between the case where junior members have a right to maintenance and one where they are in enjoyment of a maintenance (*korposh*) grant of lands. The passage seems to recognize by the words "however limited" that the right is in some sense less extensive than in the case of partible property. The statement that it is "based upon" the joint ownership is insufficient to show the intention to exclude custom as having no effect whatever, and it is only reasonable to interpret the reference to joint ownership in the light of *Baijnath's case*.⁴ General considerations of theory have their proper place but impartibility and primogeniture, when introduced into the Mitakshara, involve competition and compromise between different lines of theory: if the doctrine that "there is no coparcenary" may be pushed too far in one direction the doctrine that the junior members "are in a sense co-owners" may be pushed too far in another: the special incidents of joint family property which is impartible being overlaid in either case by rigid theory.

Though the judgment of Dalip Singh J. is not quite clear upon the point, their Lordships do not understand the learned Judges of the High Court to affirm that all male members of the family are entitled to maintenance from an impartible estate. This is not contended by Mr. Parikh for the assessee: it is contrary to much authority and practice and it would, in many if not in most cases, convert a heritage into a burden. If some members have and some have not the right, although all are equally "co-owners" or "joint owners," the difference can only be attributed to custom. If it is custom whose power has superseded the ordinary law and introduced the rule of primogeniture, the unique incidents of single heir succession (so to call it) can have no other origin. What then is the doctrine which the High Court derives from the passage cited from the *Gorakhpur case*?¹¹ Is it that custom has taken away from some of the junior members their rights of maintenance

12. (01) 24 Mad 147 : 27 I A 151 : 10 M L J 294 : 7 Sar 761 (P O), *Raja Yarlagadda Mallikarjuna Prasad Nayudu v. Raja Yarlagadda Durga Prasad Nayudu*.

but left to others those rights of maintenance which the ordinary law would give them in the case of partible property? This was thought by the Madras High Court in the *Chemudu case*, 57 Mad 1023,¹³ to have been laid down by the Board's judgment in the second *Pittapur case*,⁸ but, as has been already noticed, that judgment is opposed to it. The same doctrine, it may be, is what the High Court of Lahore have discerned in the *Gorakhpur judgment*.¹¹

In any view their Lordships think it important to make clear that this theory cannot be accepted. In partible property under the Mitakshara the right of members of the coparcenary while the family is joint is characterized by unity of ownership (community of interest) and unity of possession. This has often been stated and expounded—*cf.* the judgments of the Board delivered by Turner L. J., in the first *Shivagunga case*, 9 M I A 539¹⁴ at p. 611, and by Lord Westbury in 11 M I A 75¹⁵ at p. 89. Before partition, the right of brother, son or nephew of the karta may be called and often is called a right to be maintained, but it is the same right as the karta has himself. Unity of possession is the basis of their right, which is a right to live upon the fruits of their own property. The karta has no special interest therein: there is community of interest and each coparcener is in joint possession of the whole. The right of son or nephew in the income is not a right to an exact fraction of the income: the karta may well spend more on a son whose family is large or who has special aptitudes or necessities. But, however wide his discretion within the extensive range of family purposes, he has no right to apply any part of the income to other purposes; and is liable in appropriate proceedings to make good to the other members their shares of any sums which he has actually misappropriated. For this purpose, it is irrelevant to consider whether and in what circumstances the remedy is available apart from partition: the question is of right not of remedy. The various powers of management as karta, though given even to the father, confer on him no larger interest in the income or the corpus and no larger rights of enjoyment on his own behalf. The

consequences attached to the son's pious duty to pay a father's debts may make sad havoc at times with the sons' birth-right to an equal interest, but that is another matter.

Now it is at least certain that the holder of an impartible estate stands in no such relation to those of the junior male members of the family who are entitled to maintenance. Can he not say, "I have provided sufficiently for my sons: I shall invest the balance of the income for myself?" Certainly he can, so far as the sons are concerned. Single heir succession is inconsistent with any son having the same right in respect of income as he would have had in the income of partible property and the use of the word "maintenance" to describe the latter right cannot be allowed to confound the two. The right to maintenance in the former case is a right of a different character from that of a cosharer to enjoy his share and live upon his own property by way of joint possession. To represent that custom takes away the right to maintenance from some members but leaves it to others does not explain the facts as to impartible estates. The son's right of maintenance out of impartible property cannot be accounted for as an original and separable right untouched when custom takes away his right to joint possession. It is not something that is left after something else has been subtracted. It is a different right given sometimes to sons only and sometimes to others in consequence of the impartible character of the property; being sometimes a right of maintenance simply, and sometimes a right to a maintenance grant of lands. In their Lordships' judgment it can only be ascribed to custom as has repeatedly been held. It may be excessive to say that there is no coparcenary but it is certain that there is no joint possession.

It by no means follows, however, that the right is conferred or is available independently of membership of the joint family. There is no question of joint possession, but if "unity of ownership" be severed—and it has been held that it can only be severed by relinquishment on the part of the junior member—it may well be that even close relationship would not satisfy the custom. This relation between the rights of sons to maintenance and the "birth-right" of every male member to take by survivorship should he become senior in the senior line is the subject-matter of the observation in the *Gorakhpur case*.¹¹ That observation may be taken to establish that enjoyment of the maintenance is *prima facie* an affirmation

13. ('34) 21 A I R 1934 Mad 608 : 151 I O 926 : 57 Mad 1023 : 67 M L J 306 (S B), Commr. of Income-tax v. Narayana Gajapathi Raju.

14. (1861-63) 9 M I A 539 : 2 W R 31 : 1 Suther 520 : 2 Sar 25 (P O), Katama Natchiar v. Rajah of Shivagunga.

15. ('66-67) 11 M I A 75 : 8 W R 1 : 1 Suther 657 : 2 Sar 218 (P C), Appovier v. Rama Subba.

that the right to succeed by survivorship persists just as a maintenance grant may well be evidence negating separation at least at the date of the grant. Their Lordships are not now called upon to examine or expound these matters but are solely concerned with the character of the receipt and of the recipient of the interest which it is proposed to tax. They do not for this purpose find it necessary to answer questions hitherto undecided with respect to maintenance.

But they find it necessary to say that the law as declared in the cases of *Baijnath*⁴ and *Shiba Prasad Singh*⁵ has not been unsettled by the *Gorakhpur case*.¹¹ The observation itself and its context show that the reference to other judgments of the Board is controlled by the reference to *Baijnath's case*⁴ as having negated the view that an impartible estate could not be in any sense joint family property. The issue in the *Gorakhpur case*¹¹ was Indarjit's right to succeed and the passage cited was addressed to that. It appears to waive aside, as no longer an obstacle, the extreme logic that as there is no right to a partition the junior branch could have no right, actual or prospective, which the enjoyment of maintenance could evidence. It need not be taken as swinging to the opposite extreme; indeed it would be in a high degree unreasonable, having regard to the line of decisions, to interpret it as meaning that there is no reason why holders of impartible estates should not now be told that, unless they can prove a custom to the contrary, all junior male members of the family have a claim for maintenance—that is, all who have not relinquished their right of succession. The point made is only this: that rights of maintenance out of an impartible family estate—however little they may be and to whichever member they be extended—would not be enjoyed or enjoyable by anyone who had ceased to be joint in respect of the estate. In their Lordships' opinion, this should not be taken to affirm any disputable doctrine as to the origin of the right of maintenance, or any other doctrine which would make junior members "actual co-owners" or the right a "real right" in the sense negated by the Board in *Baijnath's case*.⁴

In the *Challapalli case* above-mentioned, 27 I A 151¹² at p. 158, the origin of the junior members' right to maintenance was not under discussion: only the amount recoverable and the property to be charged therefor. The character of the right was fully consi-

dered, however, and it was said by the Board that:

The right to maintenance is primarily a right to be maintained out of the current income of the property in the enjoyment of the party chargeable.

Their Lordships will in the present case assume that the sons of the assessee have a right to be maintained by him, that this right arises from the fact that he is the present holder of the impartible estate, and that the right is a right to be maintained out of the current income thereof in such sense that it could be enforced against the assessee in default by the Courts in India giving them a charge upon the property or a sufficient part of it. Even so, it is not true in fact or in law to say that the income from the estate is received by the assessee as the income of a joint Hindu family receivable by the karta, nor is it received by him on behalf of himself and his sons; but on his own account as the holder by single heir succession of the impartible estate. The "presently existing right" of the sons is to be paid a suitable maintenance or to have it provided for them in the ordinary course of Hindu family life. The Hindu law is familiar not only with persons such as wives, unmarried daughters and minor children for whose maintenance a Hindu has a personal liability whether he have any property or none, but also with cases in which the liability arises by reason of inheritance of property and is a liability to provide maintenance out of such property. It applies to persons whom the late owner was bound to maintain. The facts that the sons' right to maintenance arises out of the father's possession of impartible estate and is a right to be maintained out of the estate do not make it a right of a unique or even exceptional character or involve the consequence at Hindu law that the income of the estate is not the father's income.

Unity of ownership, unaccompanied by joint possession on the part of the sons or any other right of possession, would not seem to affect the character in which the income is received. Income is not jointly enjoyed by the party entitled to maintenance and the party chargeable; and their Lordships see no reason to restrict the observations which they have cited from the judgment in *Jagadamba's case*⁶ to the special class of cases where no maintenance is payable to any junior member. It cannot, in their view, be held that the respective chances of each son to succeed by survivorship make them all co-owners of the income

with their father, or make the holder of the estate a manager on behalf of himself and them, or on behalf of a Hindu family of which he and they are some of the male members. Their Lordships think that the answer proper to be given to the first question propounded in the case stated is as follows: As regards house property: for the purposes of S. 9 of the Act. No. As regards interest: for the purpose of Ss. 8 and 12 of the Act. Yes. The second question may be answered: As regards interest, Yes, and need not be further answered. Their Lordships will humbly advise His Majesty accordingly and that this appeal should be allowed and the High Court's order varied in accordance with the answers above given. The High Court's order will stand as regards costs. Since the assessee has succeeded as regards the house property which is the main part of the case the appellant must pay the assessee respondent's costs of this appeal.

K.S./R.K.

*Order accordingly.*Solicitors for Appellant—*Solicitor, India Office.*

Solicitors for Respondent —

*Stanley Johnson & Allen.***(28) A. I. R. 1941 Privy Council 128***(From Patna)***30th July 1941**LORD ATKIN, LORD RUSSELL OF
KILLOWEN AND SIR GEORGE RANKIN*S. N. Banerji and another—Appellants*
v.*Kuchwar Lime and Stone Co., Ltd. (in*
*Liquidation) and another —**Respondents.*

Privy Council Appeal No. 8 of 1941; Patna Appeal No. 36 of 1939.

(a) Civil P. C. (1908), S. 144—No variation of decree—S. 144 does not apply.

Section 144 has no application when no decree has been varied. [P 129 C 2]

(b) Decree — Binding nature of — Party not party to proceedings can show decision to be inaccurate.

It is no doubt open to a party not bound by the proceedings to adduce new facts, or fresh points of law, which might indicate the previous decision to be inaccurate. [P 129 C 2; P 130 C 1]

(c) Transfer of Property Act (1882), S. 53A — Whether applies to agreement to transfer of partial interest (*Quære*).

Whether S. 53A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. [P 130 C 1]

(d) Transfer of Property Act (1882), S. 53A—Scope — It only creates right of estoppel between proposed transferee and transferor and has no operation against third parties not claiming under them.

Section 53A does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons.

[P 130 C 1]

(e) Civil P. C. (1908), Ss. 151, 144 — Person found to be trespasser is not entitled to restitution as against person lawfully in possession.

Where the persons who have been dispossessed are found to be trespassers and the persons in subsequent possession are lawfully in possession by virtue of a valid lease in their favour, it is not necessary for the ends of justice that the trespassers should be restored to possession though they may succeed in a suit for possession. [P 129 C 2]

*J. M. Pringle — for Appellants.**Sir T. Strangman and W. W. K. Page —**for Respondents.*

Lord Atkin—These are two consolidated appeals from orders made by the High Court at Patna refusing to the appellants restoration of possession of limestone quarries in the district of Shahabad. There are two appeals because application was originally made by the first two appellants, managing director and manager, respectively, of the appellant company. A separate application was afterwards made by the company, the appellants in the second appeal. No separate point arises in respect of them. The disputes between the parties have already twice been carried to this Board and the judgments given have made it unnecessary to go into detail in deciding this appeal. In 1928 the Secretary of State granted to the Kuchwar Lime & Stone Co., Ltd., the present respondents, quarrying leases for the term of 20 years of the quarries in question. There were covenants in each lease that the lessees would not assign the lease or transfer any right or interest thereunder or underlet the whole or any portion of the premises without the assent of the Board of Revenue of Bihar and Orissa, with a provision for forfeiture on breach. In 1933 the lessee company went into liquidation and in the same year the company agreed with one Bose for the sale to him of the rights under both leases, subject to the sanction of the Board of Revenue. In the meantime, Bose was to act as agent for the company, pay to the company the dues payable by it to the Government, and work the quarries for his own profit. The agreement was not registered.

In 1934 the Government purported to forfeit the leases for breach of the above covenant and gave permission to the appellant company to enter and work the quarries, which they did. No formal lease to the appellants was executed. In September 1934, the respondent company brought a suit against the Secretary of State for a declaration that their leases had not been forfeited; and for an injunction to restrain the defendant, his servants or agents, from granting leases to the present appellants or others or authorizing them to carry on quarrying operations on the premises. The Subordinate Judge dismissed the suit, but in February 1936 the High Court allowed the appeal* and made the declaration and granted the injunction claimed. On appeal by the Secretary of State to the Privy Council in November 1937, their Lordships dismissed the appeal† holding that though the agreement with Bose purported to transfer to him‡ pending the assent of the Board of Revenue a definite interest in the property, yet as the transfer was not registered it was invalid and did not operate to create a forfeiture.

In the meantime, in August 1936, the respondent company filed a petition in the High Court in the action alleging that the Secretary of State and the present appellants, Banerji and Ghose, had been guilty of contempt‡ in working the quarries. The High Court found all the parties to be in contempt: and on receiving an apology ordered them to pay the costs. The appellant company thereupon withdrew from the quarries and ceased to work them. The Secretary of State and the appellants, Banerji and Ghose, appealed to the Privy Council from the order made on the contempt application. In October 1938, the appeal was allowed§, the Board holding that the Secretary of State had committed no breach of the injunction, and that the other two appellants were not within its terms. In November 1938, the appellants applied

by petition to the High Court for restitution of possession under ss. 144 or 151, Civil P. C. On objection being taken that the two applicants would have no personal right to possession, the company subsequently made a similar application. These two applications are those which are determined by the orders under appeal.

The appellants say that they were in possession when the order in contempt proceedings was made, that they were dispossessed by the order: and that as the order has been set aside justice requires that they should be restored to the position they occupied before the wrongful order was made. They cannot rely on s. 144, Civil P. C., for no decree was varied by the Privy Council: but they rely on the indirect power referred to in s. 151, founding themselves upon the words of Lord Cairns in giving the judgment of the Privy Council in (1871) L R 3 P C 465.¹ "One of the first and highest duties of all Courts is to take care that the act of the Court does no injury to any of the suitors." The power expressed in s. 151, Civil P. C., "is the inherent power of the Court to make such orders as may be necessary for the ends of justice." There seems no essential difference between the duty and power so expressed. Is it then necessary for the ends of justice that the appellants should be restored to possession: or did the order in contempt proceedings do them an injury? On the facts at present before the Court the appellants, as a result of the judgment of the Privy Council, were plainly trespassers. There is in existence a valid lease to the respondent company; and the lessors could grant to the appellants no rights inconsistent with it. In other words, the respondents are lawfully in possession of the premises, and it cannot be necessary for the ends of justice to oust them and put into possession the appellants who, when in, would have no right to retain possession. No "injury" was done to them in directing them to give up possession. But say the appellants: "We were not parties to the suit adjudged by the Privy Council, and it does not bind us." As against the respondent company and the lessor, the Secretary of State, this is true so far as estoppel by record is concerned. But the law laid down is authoritative so far as it goes. It is no doubt open to a party not bound by the proceedings to adduce new facts, or fresh

* See ('36) 23 A I R 1936 Pat 372: 163 I O 501: 15 Pat 460: 17 P L T 217, *Kuchwar Lime & Stone Co. Ltd. v. Secretary of State*.

† See ('38) 25 A I R 1938 P O 20: 172 I O 448: 17 Pat 69: 65 I A 45: 82 S L R 276 (P O), *Secretary of State v. Kuchwar Lime & Stone Co. Ltd.*

‡ See ('37) 24 A I R 1937 Pat 65: 166 I O 966: 16 Pat 159: 18 P L T 95 (S B), *Kuchwar Lime & Stone Co. Ltd. v. Secretary of State*.

§ See ('38) 25 A I R 1938 P O 295: 178 I O 490: 17 Pat 770: I L R (1939) Kar P O 42 (P O), *S. N. Banerjee v. Kuchwar Lime & Stone Co. Ltd.* 1941 K/17 & 18

¹ (1871) L R 3 P O 465: 40 L J P O 1: 24 L T 111: 19 W R 449: 7 Moo P O (N S) 314, *Rodger v. Comptoir D'Escompte de Paris*.

points of law, which might indicate the previous decision to be inaccurate. But on being challenged the best the appellants could do in this respect is to revert to a point which was in fact taken in the High Court, in the suit for a declaration disposed of by them and not thought worth taking by counsel for the Secretary of State before the Privy Council. It is that the transfer of interest in the property which, according to the judgment of the Privy Council was made to Bose by the agreement of 1933, was covered by the terms of S. 53A, T. P. Act : and if so was by that section exempt from registration. Now whether S. 53A applies at all to an agreement to transfer a partial interest in property, such as a right to win minerals or cut timber or the like, is a question which on this occasion it is not necessary to determine. It is at least possible that it only applies to an agreement to sell or otherwise dispose of the entirety of a piece of real property. But the words of the section make it quite plain that the section does not operate to create a form of transfer of property which is exempt from registration. It creates no real right: it merely creates rights of estoppel between the proposed transferee and transferor, which have no operation against third persons not claiming under those persons. The agreement in question according to the decision of the Privy Council was an effective transfer of an interest in the property. It was therefore registrable: and being unregistered was invalid: and could not operate as a breach of covenant so as to cause a forfeiture. This point fails the appellants, and they could suggest no other ground for supposing that they would establish any right to be in possession.

It is of course possible, though it seems very unlikely, that if the appellants were to bring a suit to establish possession they might succeed in escaping the decision as to forfeiture already given. Nothing in the present decision will prevent them. All that is decided is that on the present materials they were trespassers, and if reinstated would still be trespassers, and that justice does not require such a preposterous conclusion as that they should be put back in a position which they have no right to occupy, and from which a second proceeding would on present materials certainly oust them. The High Court in their judgment apparently came to the conclusion that the appellants were not in possession at the time of the contempt proceedings, and were not

deprived of possession by the order of the Court. Their Lordships would have difficulty in accepting either of these conclusions. But it is unnecessary to discuss them: for they have come to the conclusion that the High Court were clearly right in the third ground for their decision that in any event the appellants were not entitled to an order for restitution. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants must pay the costs.

K.S./R.K.

Appeal dismissed.

Solicitors for Appellants —

Hy. S. L. Polak & Co.

Solicitors for Respondents —

Sanderson Lee & Co.

* (28) A. I. R. 1941 Privy Council 130

(From Patna : ('38) 25 A I R 1938
Pat 273)

30th July 1941

LORD ATKIN, LORD RUSSELL OF
KILLOWEN AND SIR GEORGE RANKIN.

*Sri Sri Baidyanathji through Sadu-
padhya Sri Sri Bhabaparitananda
Ojha — Appellant*

v.

Smt. Urmila Devi and others —

Respondents.

Privy Council Appeal No. 47 of 1940, Patna
Appeal No. 93 of 1939.

* Limitation Act (1908), S. 10 before amendment of 1929 — Decree in scheme suit — High priest of temples appointed trustee of all properties moveable and immovable devoted to service of temple God—High priest held trustee within S. 10 and suit to recover war bonds vested in him held not barred by any length of time : 19 P L T 367=('38) 25 A I R 1938 Pat 273 =176 I C 209, *REVERSED*.

Called by whatever name, the high priest of a temple or person in like position is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending on usage and custom. In no case is the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration. [P 182 C 1]

But where the Court had exercised the powers conferred upon it by the Civil Procedure Code, viz., to appoint a trustee and to vest the property in the trustee, and appointed the high priest a "trustee of all the properties moveable and immovable devoted to the service" of the temple God :

Held that the high priest was a trustee within the meaning of S. 10 and the war bonds which formed part of the temple properties vested in him in trust for a specific purpose and a suit for re-

covery of the same was not barred by any length of time : 19 P L T 367=(138) 25 A I R 1938 Pat 273=176 IC 209, *REVERSED*; (122) 9 A I R 1922 P C 123, *Expl.* [P 132 C 1]

C. Bagram — for Appellant.

Respondents Ex parte.

Lord Russell of Killowen. — The only question which their Lordships have to determine in this appeal is whether the properties of the Baidyanath temple were vested in trust in the high priest of the temple within the meaning of S. 10, Limitation Act (9 of 1908.) If the answer to this question is in the affirmative, the appellant's suit is not barred by any length of time and this appeal must succeed. The suit was brought in the name of the deity of the temple, through the present high priest, against respondent 1 (who is the widow and executrix of the late high priest), to recover from her the principal moneys amounting to Rs. 4200 due on certain war bonds (which formed part of the temple properties, but were retained by the widow as such executrix), together with a sum of interest thereon amounting to Rs. 2577-8-0. The suit was tried by the Subordinate Judge of Deoghar who, on 28th June 1935, ordered and decreed that the plaintiff was entitled to recover from the widow Rs. 6777-8-0 with subsequent interest. He decided in favour of the plaintiff on the merits of the case, and upon the question whether the suit was barred by limitation (which was issue 5), he held that by virtue of a scheme for the temple management settled by a decree made on 4th July 1901, the late high priest was an express trustee of the war bonds with the result that the action was not barred.

The widow appealed to the High Court of Judicature at Patna. On 3rd December 1937, the appeal was allowed and the suit was dismissed with costs. While agreeing with the trial Judge as to merits, the learned Judges of the High Court were of opinion that the late high priest was not a trustee, and that S. 10 did not apply. In those circumstances, they held that Art. 48, Limitation Act, applied, and that the suit had not been commenced within the requisite period of three years. It was, therefore, barred. Their Lordships are unable to agree with the High Court; they agree with the view and reasoning of the Subordinate Judge. The decree of 4th July 1901 was made in pursuance of the powers conferred by S. 539, Civil P. C., 1882, which ran thus :

539. In case of any alleged breach of any express or constructive trusts created for public charitable or religious purposes, or whenever the

direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting ex officio, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose civil jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—(a) appointing new trustees under the trust; (b) vesting any property in the trustees under the trust; (c) declaring the proportions in which its objects are entitled; (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged; (e) settling a scheme for its management; or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Such a suit was brought in 1897, complaining of the conduct of the then high priest of this temple (who was defendant 1 to the suit), and praying—

that a proper person may be appointed to be Sardar Panda, and that the debuttar properties may be vested in such a person, and that the Court may frame rules for the management of the debuttar properties, the said order to be made under S. 539, Civil P. C.

After a lengthy trial a decree was made, which was subsequently amended, but dated back to the date of the original decree, viz., 4th July 1901. The relevant portions of this decree are paras. 1 and 2, which run thus :

1. That in the stead of defendant 1 a new Sardar Panda be elected to hold office for life according to the second rule given in Sch. A annexed hereto and that the said defendant 1 be removed from the said office thereon. Defendant 2 being the heir entitled to succeed under the first rule is disqualified on account of his minority, but shall be entitled to succeed on the death of the Sardar Panda now to be elected provided he be then duly qualified under the first rule in the said Sch. A. The said Sardar Panda being duly elected shall be trustee of all the properties moveable and immovable devoted to the service of the God Mahadeva Vaida Nath Jiu established in mauza Deoghar, district Santhal Parganas within the jurisdiction of this Court; and that as such trustee he shall be bound to observe the conditions of his trust according to ancient usage and as laid down in Sch. B.

2. That the whole of the said properties moveable and immovable be vested in the said trustee immediately on his election subject to the conditions hereinafter set forth.

The Sardar Panda who was duly elected pursuant to that decree, was the high priest whose widow and executrix is defendant 1 to the suit which is the subject of this appeal. The High Court, in coming to their decision, relied upon the case in 48 I A 302¹

1. (122) 9 A I R 1922 P O 123 : 65 I O 161 : 44 Mad 881 : 48 I A 302 (P O), *Vidya Varuthi Thirtha v. Balusami Ayyar*.

at p. 311, in which Mr. Ameer Ali, in delivering the judgment of the Board, used the following language in reference to high priests of temples and persons in like positions :

Called by whatever name, he is only the manager and custodian of the idol or the institution. In almost every case he is given the right to a part of the usufruct, the mode of enjoyment and the amount of the usufruct depending again on usage and custom. In no case was the property conveyed to or vested in him, nor is he a 'trustee' in the English sense of the term, although in view of the obligations and duties resting on him, he is answerable as a trustee in the general sense for maladministration.

This judgment of the Board is without doubt a correct statement of the general law. It was a novel view when propounded and it was followed by the amendment made to S. 10 by the Limitation Amendment Act (1 of 1929). But the present case is one which on its facts is an exception to the general rule. In the present case the Court has exercised the powers conferred upon it by the Code, viz., to appoint a trustee and to vest the property in the trustee. The words of S. 539 and the words of the decree are equally plain: and by virtue of the decree pronounced under the section, the late high priest was a "trustee of all the properties moveable and immovable devoted to the service" of the temple God. The war bonds were accordingly in fact vested in him in trust for a specific purpose, and the plaintiff's suit, falling within the words of S. 10, Limitation Act (9 of 1908), cannot be barred by any length of time. The appeal should, therefore, be allowed, the decree of the High Court should be set aside, and the decree of the Subordinate Judge should be restored. Their Lordships will humbly advise His Majesty accordingly. Respondent 1 will pay to the appellant his costs of the appeal to the High Court and of the appeal to His Majesty in Council.

K.S./R.K.

Appeal allowed.

Solicitors for Appellant—*Hy. S. L. Polak & Co.*
Respondents *ex parte*.

* (28) A. I. R. 1941 Privy Council 132
(*From Lahore*)

16th July 1941

LORD CHANCELLOR (VISCOUNT SIMON),
LORDS ATKIN, THANKERTON AND
RUSSELL OF KILLOWEN AND
SIR GEORGE RANKIN.

Muhammad Nawaz alias Nazu
Petitioner

v.
Emperor.

(*For special leave to appeal in forma pauperis.*)

* Privy Council — Criminal appeals — When Privy Council will interfere in criminal cases and when certificate for appealing to Privy Council should be granted explained.

The Judicial Committee is not a revising Court of criminal appeal: that is to say, it is not prepared or required to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination as a hostile witness or in awarding particular punishments. The Judicial Committee cannot be asked to review the facts of a criminal case, or set aside conclusions of fact at which the tribunal has arrived. In all such cases an appeal on such grounds is useless, and is indeed an abuse of the process of the Court. Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. There must be something so irregular, or so "outrageous, as to shake the very basis of justice." An obvious example would be a conviction following a trial, where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses. Similarly, of course, if the tribunal was shown to have been corrupt, or not properly constituted, or incapable of understanding the proceedings because of the language in which the proceedings were conducted. Another and obvious example would arise if the Court had no jurisdiction either to try the crime, or to pass the sentence. And counsel who certify that a petition of appeal might be reasonably presented will be justified in doing so only on one of the grounds above mentioned or other equally important ground: (1887) 12 A C 459 and ('32) 19 A I R 1932 P C 234, *Re-affirmed*. [P 133 C 1, 2; P 134 C 1]

Lord Chancellor. — The Judicial Committee has before it this morning 13 petitions for special leave to appeal in criminal cases in forma pauperis. All the proposed appeals are from the High Court of Judicature at Lahore, which in each instance has confirmed the decision of a Sessions Judge sentencing the petitioner to death for murder. In each of these 13 cases the papers before their Lordships include (as R. 8 of

the Judicial Committee Rules requires) a certificate signed by counsel in India that the petitioner has reasonable grounds of appeal to this Board. Their Lordships regret to find that, with the possible exception of the petition in the case of *Rehmat v. King-Emperor*, there is no basis whatever on which a certificate could, or should, have been given expressing the opinion that there were grounds on which the petition could properly be presented. This is a very serious matter, not only because those who so certify are misusing their professional position, but because the due course of criminal justice is interfered with if the delay of application to the Board is interposed without any valid reason between the judgment of the Court in India and the due execution of the sentence which that Court thinks it right to pronounce.

Their Lordships' attention is called to the fact that this is not the first time that a batch of petitions has been brought before the Board praying, on wholly inadequate grounds, that appeals may be brought against death sentences for murder which have been duly confirmed by the High Court of Lahore. This has happened several times, e. g., in May last nine such petitions came before the Board from Lahore, together with one from Oudh, one from the North West Frontier Province, and one from Sind. In these cases also the certificates as to reasonable cause of appeal, without which no application was possible, were equally unwarranted. It is evident that there exists in parts of India, and especially in the Punjab, a serious error as to the strict and definite limits within which the Judicial Committee entertains appeals from a criminal sentence. Their Lordships must assume that these certificates are given under a misunderstanding of the true position, as otherwise some of them could only be explained as proceeding from an utter disregard of the solemn and serious responsibilities of the counsel who certify. Their Lordships therefore desire to restate, in unmistakable terms, the limits of the jurisdiction exercised in criminal appeals by the Judicial Committee, and trust that this explanation will be carefully noted in the quarters where it seems to be needed and that the practice, of which their Lordships have to complain, will cease.

The Judicial Committee is not a revising Court of criminal appeal: that is to say, it is not prepared or required to re-try a criminal case, and does not concern itself with the weight of evidence, or the conflict of

evidence or with inferences drawn from evidence, or with questions as to corroboration or contradiction of testimony, or as to whether there was sufficient evidence to satisfy the burden of proof. Neither is it concerned to review the exercise by the previous tribunal of its discretion as to permitting cross-examination as a hostile witness or in awarding particular punishments. In some of the certificates of counsel which are before their Lordships in connexion with the present set of petitions the certificate sets out particular reasons why it is considered that there is a reasonable ground for appeal, and these reasons disclose that the certifying counsel has not appreciated, or allowed for, the fact that the Judicial Committee cannot be asked to review the facts of a criminal case, or set aside conclusions of fact at which the tribunal has arrived. In all such cases an appeal on such grounds is useless, and is indeed an abuse of the process of the Court.

It may be of assistance to counsel, who are considering whether they are justified in certifying that a petition of appeal in a criminal case might reasonably be presented, to give illustrations, by way of contrast, of what are the limited but very important grounds on which a petition in a criminal case may properly be presented. Broadly speaking, the Judicial Committee will only interfere where there has been an infringement of the essential principles of justice. An obvious example would be a conviction following a trial, where it could be seriously contended that there was a refusal to hear the case of the accused, or where the trial took place in his absence, or where he was not allowed to call relevant witnesses. Similarly, of course, if the tribunal was shown to have been corrupt, or not properly constituted, or incapable of understanding the proceedings because of the language in which the proceedings were conducted. Another and obvious example would arise if the Court had no jurisdiction either to try the crime, or to pass the sentence. These limitations upon the interference of the Judicial Committee with convictions arrived at by tribunals charged with criminal jurisdiction beyond the seas, have been again and again laid down in the clearest terms at this Board. It is sufficient to quote Lord Watson's words:

The rule has been repeatedly laid down and has been invariably followed, that Her Majesty will not review, or interfere with, the course of criminal proceedings, unless it is shown that, by a disregard of the forms of legal process, or by some

violation of the principles of natural justice, or otherwise, substantial or grave injustice has been done, (1887) 12 A C 459,¹

or, as Lord Dunedin said, "There must be something so irregular, or so outrageous, as to shake the very basis of justice," 59 I A 233.² Their Lordships have thought it right on this occasion to re-state these principles at some length in the hope that it will assist practitioners, who are asked to certify in support of a proposed petition, in determining whether it is in accordance with their professional duty to do so. They trust that these observations will have a beneficial effect. If, indeed, after this explanation and warning petitions continue to reach the Board which never should have been certified, it will be necessary to call the attention of the suitable authorities in the area from which such petitions come to the continued disregard of the rule by the certifying counsel concerned. Their Lordships must make it plain that no reflection is involved upon the conduct of counsel or solicitors representing these petitioners before the Board today: they cannot properly be held responsible for improper certificates signed by other counsel in India. Their Lordships will therefore humbly advise His Majesty that all the petitions should be dismissed.

K.S./R.K.

Petitions dismissed.

1. (1887) 12 A C 459 : 56 L T 615 : 36 W R 81 : 16 Cox C C 241, *In re Dillet*.
2. ('32) 19 A I R 1932 P C 234 : 140 I C 290 : 34 Cr L J 18; 13 Lah 479; 59 I A 233 (P C), *Mohindar Singh v. Emperor*.

* (28) A. I. R. 1941 Privy Council 134

(*From Canada*)

30th July 1941

LORDS CHANCELLOR, THANKERTON,
RUSSELL OF KILLOWEN
AND ROMER

Port Royal Pulp and Paper Co., Ltd.—
Appellant

v.

Royal Bank of Canada — Respondent.

Privy Council Appeal No. 75 of 1939.

(a) Bank Act (Canada) (1934), S. 88 — Security must be given by owner.

The security under S. 88 must be given by the owner: otherwise it is of no avail (on facts held assignor was not owner within the meaning of S. 88 and hence the security was invalid).

[P 138 C 1]

(b) Tort — Conversion — Delivery of goods taken by person authorized to do so is not conversion of goods.

The taking delivery of goods under a sale which was authorized by the secured creditor cannot be the foundation of a claim by that creditor for damages for conversion of his goods. [P 139 C 1]

* (c) Vendor and purchaser — Assignment of rights of vendor under contract of sale—Vendor to incur expenses before production or delivery of goods under contract — Claim by assignee against purchaser for purchase price — Purchaser must be given credit for all payments which he has been compelled to provide to obtain delivery.

Where there has been an assignment of the rights of a vendor under a contract for the sale of a commodity, which can only be produced and delivered to the purchaser after expenses have been incurred by or on behalf of the vendor, in the shape of wages, stumpage payments, freight and so forth and the purchaser has been compelled to provide these essential payments in order to obtain delivery, credit must be given to the purchaser, against any claim to the purchase price by the assignee by way of security of the vendor's rights, for all payments which were essential to the production of the subject-matter of the sale, and without which there would have been no sale completed, no purchase price payable, and consequently no subject-matter of the security. [P 139 C 1, 2]

*D. N. Pritt and John Bassett—*for Appellant.

*Lawrence Jones & Co.—*for Respondent.

Lord Russell of Killowen — In this case the Supreme Court of Canada has reversed the judgment of the Supreme Court of New Brunswick Appeal Division and has restored the judgment of the trial Judge. The defendant to the action has appealed to His Majesty in Council. The relevant facts must first be stated, and they are so exceptional and peculiar to this case that, as will appear, and as appears to their Lordships, no important point of law really arises for decision on this appeal. Four personages figure in the story which leads up to the institution of this litigation: (1) a limited company incorporated under the laws of New Brunswick and called New Lepreau, Ltd., (2) an individual named Atkinson, (3) the appellant, a paper manufacturing company incorporated under the laws of the Dominion of Canada (hereinafter referred to as the company) and (4) the respondent, the Royal Bank of Canada (hereinafter referred to as the Bank). New Lepreau, Ltd., held licences to cut pulpwood within certain limits, viz., over an area of 62 square miles of Crown lands on the New River Estate, County of Charlotte, in New Brunswick. Of its 489 issued shares Atkinson originally held all except two shares; but at the times material to this litigation the company held 241 of those shares (as security from Atkinson), and as to the 247 shares, the certificates had been endorsed

by Atkinson in blank and were held as security by the bank.

In the spring of 1933 New Lepreau, Ltd., entered into a contract with the company for the sale of a quantity of pulpwood. No copy of this contract is in evidence, but its working out resulted in a substantial sum being due from New Lepreau Ltd., to the company in respect of moneys advanced by the company to finance the operations by New Lepreau Ltd., necessary under the contract. The amount of this sum was subsequently ascertained to be \$5,890.91. This contract will be referred to as the first contract. On the 31st of October 1933, New Lepreau, Ltd., entered into another contract (hereinafter referred to as the second contract) with the company, for the sale of 1000 to 4000 cords of pulpwood to be cut from the New Lepreau limits. The contract provided for payments to be made by the company in advance, and on account of price, at different stages of the operations. During the pendency of that contract, and after advances under it to the extent of some \$484.90 had been made by the company to New Lepreau, Ltd., Atkinson (who was already heavily indebted to the bank) applied to the bank for further monetary assistance. The bank, as might be expected, required security; but the bank's rights and powers to take security are controlled by the Bank Act, 1934, which re-enacted with certain amendments (immaterial for the present purpose) Cap. 12 of the R. S. C. 1927. On 20th January 1934, Atkinson gave a notice of his intention to give security to the bank, which notice was registered on 22nd January 1934. On 24th January 1934, Atkinson signed an application under seal addressed to the bank, requesting the bank to grant and continue for 12 months from that date "a revolving line of credit for my pulpwood business of \$5000" and to make advances to him thereunder on the security of his pulpwood. On the same day he purported to give this security to the bank, in respect of the sum of \$1000 advanced to him by the bank. The document consists of a printed form in which printed words have been struck out, and blanks have been filled in, the ultimate outcome being a document under seal and signed by Atkinson which runs thus:

In consideration of an advance of one thousand dollars made by the Royal Bank of Canada to the undersigned for which the said bank holds the following bills or notes, 24th January 1934, \$1,000.00 the products of the forest, the goods wares and merchandise mentioned below are here-

by assigned to the said bank as security for the payment of the said bills or notes or renewal thereof or substitutions therefor and interest thereon. This security is given under the provisions of S. 88 of the Bank Act and is subject to the provisions of the said Act. The said products of the forest the goods wares and merchandise are now owned by the undersigned and are now in the possession of Ewart O. Atkinson and are free from any mortgage lien or charge thereon (except previous assignments to the Bank) and are the following all the rough or draw shaved spruce and fir pulpwood and are in the Lawrence flowage on New River stream in the county of Charlotte or elsewhere.

On 1st March 1934, the company agreed at the request of Atkinson, that his name should be substituted for New Lepreau, Ltd., in the second contract. This was done apparently by taking the existing document, enclosing the words "New Lepreau, Ltd.," in brackets, and typing over them the words "E. C. Atkinson." The result was that Atkinson became "the seller" within the meaning of the contract. No re-execution of the document appears to have taken place, nor was any release or agreement for novation executed by New Lepreau, Ltd., but it was agreed between Atkinson and the company that the company should be entitled to charge against the second contract (i.e., in reduction of the price payable thereunder) the amounts over-advanced under the first contract, and the amounts already advanced to New Lepreau, Ltd., under the second contract, before the substitution of Atkinson. Such an agreement would naturally be insisted upon by the company, so as to ensure that the right of deduction which they could have asserted against New Lepreau, Ltd., was not taken away or impaired by the proposed substitution of Atkinson. This agreement is hereinafter referred to as the deduction agreement.

Having obtained the company's consent to this substitution, Atkinson proceeded to use the contract as a means of affording further security to the bank; and on 10th March 1934, he executed a document, by which he assigned to the bank all moneys, claims, rights and demands to which he was then or might thereafter be entitled to under the second contract, as collateral security for the fulfilment of all his obligations, present and future, to the bank. The bank gave notice of this assignment to the company by letter dated 12th March 1934, and the company in their reply dated 16th March 1934, indicated that the amount of the advances made during the winter amounting to \$484.90 and over-advances on the first

contract were chargeable against the second contract. The amount of the over-advances were then estimated to be about \$4000 but were eventually ascertained to amount to a sum of \$5,300.00. The bank attempted to challenge this claim of the company, but it is evident that they must take their assignment of Atkinson's rights under the second contract subject to the existing deduction agreement.

On 26th April 1934, Atkinson (therein called the seller) entered into a further contract (hereinafter referred to as the third contract) with the company for the sale to the company of 10,000 cords of peeled spruce and fir pulpwood, "to be cut from lands owned or controlled by the seller and situated in Charlotte County N. B." at a price of \$7.25 per cord; and on 27th May 1934, Atkinson assigned to the bank all moneys, claims, rights and demands to which he was then or might thereafter be entitled under the third contract, as collateral security for the fulfilment of all his obligations present or future to the bank. Notice of this assignment was given to the company on 17th July 1934. On 16th July 1934, Atkinson signed a supplementary application under seal to the bank requesting the Bank to grant and continue for 12 months from that date "a revolving line of credit for my pulpwood business of \$10,000" and to make advances to him thereunder on the security of his pulpwood. On 12th July 1934, the amount then due to the bank by Atkinson in respect of the revolving line of credit asked for on 24th January 1934, was \$5,000.00. From time to time sums had been paid off and from time to time other sums (within the limit of \$5,000.00) had been advanced by the bank. On the occasion of each fresh advance the bank took from Atkinson a document purporting to be a security on pulpwood, in the form above set forth, and covering the total of the principal moneys then due from him.

In response to his request, on 16th July 1934, the bank advanced further sums to Atkinson with the result that on 29th January 1935, the amount due to the bank from Atkinson was a principal sum of \$8,000.00. The same practice as before had been pursued since 12th July 1934, in regard to taking what purported to be securities on pulpwood, in the form above set forth, for the total amount from time to time due, the only variation being that on and after 11th September 1934, the description of the pulpwood included the words "or sap-

peeled." From early in November 1934 onwards, deliveries of pulpwood to the company took place under the second and third contracts to the following extents, viz., 707.17 cords under the second contract, and 5,298.26 under the third contract, all cut within the limits of New Lepreau, Limited, with the immaterial exception of some which had been cut in trespass of the rights of a third party, who, however, has been settled with. No question arises in regard thereto. In order, however, to get these deliveries under the second and third contracts, the company had to disburse moneys in advance of purchase price, and further moneys to meet various expenses which had of necessity to be incurred and discharged before any deliveries under the contracts could be made; but as regards payments made in advance of price all such payments made under a contract after notice of the assignment to the bank of the rights under that contract, were only made in such a way that the bank in fact received them. Atkinson's financial position was obviously an unsatisfactory one from the points of view both of the company and the bank. Attempts were made to adjust matters so that further financial assistance could be given in order to work out the pulpwood contracts. They came to nothing, and on 22nd February 1936, the bank commenced the present litigation by issuing a writ against the company claiming by the amended endorsement thereon the following relief :

The plaintiff's claim is for damages for wrongfully depriving the plaintiff of certain pulpwood of the plaintiff which the defendant converted to its own use.

The plaintiff also claims against the defendant for the purchase price of certain goods and merchandise sold and delivered to the defendant under two certain contracts in writing, one made between New Lepreau, Limited, and the defendant, dated 31st October 1933, which with the consent of the defendant was transferred by New Lepreau, Limited, to one Ewart C. Atkinson; the other dated 26th April 1934, made between the said Ewart C. Atkinson and the defendant, and both assigned by the said Ewart C. Atkinson to the plaintiff before action brought.

By their amended statement of claim the bank pleaded these obviously inconsistent and contradictory claims as alternative claims for (1) the purchase price payable by the company under the second and third contracts or (2) damages for conversion of the pulpwood delivered to the company under those contracts, the latter claim being made upon the footing that by virtue of the securities on pulpwood purported to be

given by Atkinson in the forms hereinbefore mentioned, the pulpwood so delivered to the company was the property of the bank. In respect of either claim the bank only sought to recover a sum of \$8,366.66 being, it was alleged, the total amount and interest due by Atkinson to the bank for the advances made to him. The company pleaded as regards the claim for damages for conversion that the bank's alleged securities on the pulpwood were invalid under the Bank Act, and that the pulpwood delivered to the company under the second and third contracts was never at any time the property of the bank, nor was the bank at any time entitled to possession thereof. As regards the claim in respect of the purchase prices payable under the second and third contracts, the company pleaded that after crediting those purchase prices against the debit balance due on the first contract and against the moneys paid by the company in advance of the second and third contract prices and to meet the various expenses which had of necessity to be incurred and discharged before any deliveries under those contracts could be made, there remained an adverse balance of \$542.29 due from Atkinson to the company. Those being, as their Lordships conceive, the relevant facts of this case, it remains to be seen how the action was dealt with by the Courts in Canada. The action was tried by Barry C. J. who gave judgment for the bank for the \$8,000 with interest. Their Lordships find themselves in some doubt as to whether the Chief Justice acceded to the bank's claim for damages for conversion, or to the claim on contract. While he indicates views which as to some are relevant to one claim, and as to others are relevant to the other claim, his judgment is contained in the following sentence :

Under the facts, as disclosed by the evidence, and according to the law as I understand it, I have had no difficulty whatever in arriving at the conclusion that the plaintiff is entitled to recover.

Unfortunately, in the absence of any clearer indication of the evidence and the law which the learned Chief Justice had in mind, it is difficult to say which of the bank's claims was successful. Clearly both cannot have succeeded; they are inconsistent and mutually destructive. On the whole, the many references in the judgment to the bank's security on the pulpwood make their Lordships think that the bank was awarded damages for conversion. An appeal from this judgment came before the Supreme

Court of New Brunswick, Appeal Division, and was heard by Baxter C. J. and Grimmer and Fairweather JJ. The judgment of the Court was delivered by Baxter C. J. They took the view that the bank's alleged securities on the pulpwood were invalid under the Bank Act, and that accordingly the claim for damages for conversion must fail. As regards the claim *ex contractu* they were of opinion that the bank could not claim more than Atkinson would have been entitled to receive. They accepted the company's claims for credit in respect of the moneys paid in advance of purchase price, and to meet the various expenses before mentioned. As regards the deduction agreement, while they were of opinion that it applied to the second contract, and had been made before the assignment by Atkinson to the bank, they held that no agreement to charge against the third contract had been proved. The result of this view was to establish a balance of \$192.02 in Atkinson's favour on the second and third contracts. An order was accordingly made on 11th June 1937,

that the judgment in favour of the plaintiff be reduced to the sum of one hundred and ninety-two dollars and two cents (\$192.02) with the costs of the action, and that the appellants have the costs of the appeal.

The bank appealed to the Supreme Court of Canada. The appeal was argued on 17th and 18th May 1938, and on 19th December 1938, that Court (consisting of Cannon, Crocket, Davis, Kerwin and Hudson JJ.) allowed the appeal, set aside the order appealed from and restored the judgment of Barry C. J. Crocket J. (with whom Cannon and Hudson JJ. concurred) was of opinion that the bank's claim to damages for conversion should succeed. As regards the claim *ex contractu*, he deals with it thus :

If the Appeal Court is right in its conclusion that the bank's securities under S. 88, Bank Act, were invalid because Atkinson was not the owner of the pulpwood within the meaning of that section, and the case is one which rests entirely, so far as the bank is concerned, upon the assignments to it of Atkinson's rights under the two contracts of 31st October 1933 and 26th April 1934, the result at which it arrived might be difficult to impeach.

He then states that in his view the appeal turned

entirely upon the question of the validity of the bank's assignments under S. 88 in respect of the two contracts of 31st October 1933 and 26th April 1934, and their relation to each other.

Their Lordships are somewhat puzzled by this sentence, with its allusion to the second and third contracts; for S. 88 has no

reference to securities such as the assignments of Atkinson's rights thereunder. The sentence can, they think, only mean that the learned Judge is treating the securities purported to be given by Atkinson on pulpwood as being (which they are not) assignments of pulpwood to be delivered to a purchaser under a contract specified therein. If they were assignments in that form, the claim for damages for conversion would indeed be a strange one. The learned Judge then proceeds to rely on what he terms "the reasons by which Barry C. J. so lucidly and logically supports his judgment." He gives no reasons of his own, but merely states:

I have no hesitation in holding for my part that upon the undisputed facts as disclosed by the evidence, Atkinson must be treated as the owner of the pulpwood when it was cut, within the meaning of S. 88, Bank Act, and that his assignments to the plaintiff bank were valid thereunder.

Davis J. (with whom Hudson J. also agreed) thought that the bank was entitled to damages for conversion by the company of the pulpwood delivered under the second and third contracts. After a caustic, but justifiable, reference to the loose and unbusinesslike manner in which the transactions in question were carried on by the bank, the company and Atkinson, the learned Judge stated that:

All that is plain in the evidence is that the timber involved in this case was cut upon Crown land in respect of which New Lepreau, Ltd., held a licence to cut.

He then states that no one appears to have paid the slightest attention to the rights of that company, which, for the purposes of the second and third contracts was obliterated from the picture. He accepts the view that Atkinson agreed that the company could charge up against him the loss on the first contract, though it is not clear whether he thinks that this agreement applies to the third contract as well as the second contract. But on the question of conversion he holds that the security given by Atkinson to the bank on pulpwood was valid. His judgment on this point is contained in the following words:

It seems quite plain to me that Atkinson had at all times a qualified ownership or interest in the wood, as soon as it was cut from the standing timber, sufficient to entitle the bank to take from him S. 88 security. I think the attack upon the bank's security fails.

Kerwin J. had no hesitation in coming to the conclusion that the security under S. 88 must be given by the owner, and that otherwise it is of no avail; but after stating that New Lepreau, Ltd., made no claim

that it was owner, and that the company's interest in the logs arose only by virtue of the second and third contracts, he continued: "I think the proper inference from the evidence is that Atkinson was the owner and that he gave security to the bank under S. 88." He then held that the bank had acquired all the right and title of the owner Atkinson, and that the company had converted the logs to its own use and was liable in damages for the value of the logs at the time and place of conversion. The damages, however, he assessed upon grounds immaterial to consider, at a figure considerably lower than the bank's claim.

On appeal by special leave to His Majesty in Council by the company the case was argued in careful detail before their Lordships, with the result that in their Lordships' opinion the appeal should be allowed and the order of the Appeal Division of the Supreme Court of New Brunswick should be restored. As stated earlier in this judgment the relevant facts are exceptional and peculiar to this case. They are of such a nature that a declaration of the invalidity of the bank's pulpwood securities, so far from being a decision of far-reaching and evil consequences under the Bank Act, as was somewhat menacingly suggested by counsel for the bank, simply amounts to a decision that upon the facts of this case Atkinson was not an owner of the pulpwood here in question within the meaning of S. 88, Bank Act. The authorities cited in the course of the argument gave no real assistance to their Lordships. The mistaken foundation of the opposite view which appears in the judgments in favour of the bank, is in part a failure to treat New Lepreau, Ltd., as an entity separate from the body of its shareholders, and in part (as a consequence thereof) a failure to appreciate the true position in law of Atkinson under the second and third contracts.

Undoubtedly, as pointed out by Baxter C. J., Atkinson thought of and treated himself and New Lepreau, Ltd., as one. "I am the New Lepreau, Ltd.," he says; and so in his opinion it makes no difference if the second and third contracts are in his name. He will still, nevertheless, be dealing with timber which is to be cut within the New Lepreau, Ltd., limits, and which in law belongs to the Crown, but which New Lepreau, Ltd., alone is licensed to cut, and which when cut and stumpage paid will be that company's property to deliver to a purchaser. There is no suggestion in the evi-

dence that in dealing with timber to be cut within the New Lepreau, Ltd., limits, he was setting up or attempting to set up a claim to deal with the timber adversely to New Lepreau, Ltd. There was never any surrender by New Lepreau, Ltd., of its rights, such as they were, in the timber within its limits; nor was there, nor in the circumstances of this case could there have been, any taking of possession of the limits, or of the timber adversely to New Lepreau, Ltd. The licences to cut continued throughout to be licences to New Lepreau, Ltd., only. The state of affairs so far as concerns the physical possession of the limits, and the persons engaged in the operations carried on within the limits, was just the same from March 1934, onwards, as it had existed previously. The attitude of mind, "I am the New Lepreau, Ltd.," (shared as it seems to have been by the parties to this action) carries with it the implication, "what I do, is done by New Lepreau, Ltd.," just as much as the the implication, "what New Lepreau, Ltd., does, is done by me." Their Lordships find it impossible to hold that in this case anything happened to confer upon Atkinson, or that Atkinson had any interest proprietary or possessory in the pulpwood which is alleged to have been converted by the company. Whoever was the owner within the meaning of the Act, Atkinson certainly was not. In these circumstances the bank's alleged security on pulpwood was invalid, and the claim to damages for conversion necessarily fails.

Another answer to this claim (and this is upon the footing of the security being valid) is to be found in agreements entered into by Atkinson with the bank on 24th January 1934 and 16th July 1934 when the bank granted the revolving lines of credit on the security of pulpwood. These agreements need not be referred to in detail; it is sufficient to say that under them Atkinson was authorized to sell the pulpwood. It is difficult to see how the taking delivery of goods under a sale which was authorized by the secured creditor, could be the foundation of a claim by that creditor for damages for conversion of his goods. As regards the alternative claim for the price of the pulpwood sold and delivered under the second and third contracts, their Lordships agree with the views of the Appeal Division. The bank's security consists of an assignment of the rights of a vendor under a contract for the sale of a commodity, which can only be produced and delivered to the purchaser

after expenses have been incurred by or on behalf of the vendor, in the shape of wages, stumpage payments, freight and so forth. The circumstances are such that in order to obtain delivery of what is agreed to be sold, the purchaser has been compelled to provide these essential payments. Then and only then can he obtain delivery; then and only then does he become liable for the purchase price or the balance thereof then due. In these circumstances it appears to their Lordships (quite apart from the doctrine of salvage advances) that credit must be given to the purchaser, against any claim to the purchase price by an assignee by way of security of the vendor's rights, for all payments which were essential to the production of the subject-matter of the sale, and without which there would have been no sale completed, no purchase price payable, and consequently no subject-matter of the security.

Their Lordships also agree with the Appeal Division in holding that the deduction agreement between Atkinson and the company (made before the assignment of 10th March 1934 to the bank, and therefore binding on the bank) was not proved to have been made in relation to the third contract. The result is that their Lordships are of opinion that this appeal should be allowed. The order of the Supreme Court of Canada should be discharged and the order of the Supreme Court of New Brunswick, Appeal Division, restored. They will humbly advise His Majesty accordingly. The respondents will pay the appellant's costs here, and in the Supreme Court of Canada.

K.S./R.K.

Appeal allowed.

Solicitors for Appellant — *Frank Gahan.*

Solicitors for Respondent —

Norton Rose, Greenwell & Co.

(28) A. I. R. 1941 Privy Council 139

(From Palestine)

1st July 1941

LORDS ATKIN, RUSSELL OF KILLOWEN,
ROMER AND SIR GEORGE RANKIN AND
LORD JUSTICE CLAUSON.

Jaber Elias Kotia and another —

Appellants

v.

Katr Bint Jiryes Nahas — Respondent.

Privy Council Appeal No. 58 of 1939.

Succession Act (1925), S. 5 — Phrase referring to national law of *propositus* — Meaning.

In the English Courts phrases which refer to the national law of a propositus should *prima facie* be construed not as referring to the law which the Courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the Courts of that country would apply to the particular case of the propositus, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant): (1919) A C 145; (1930) 1 Ch 377 and (1930) 2 Ch 259, *Rel. on*. [P 143 O 1]

D. N. Pritt and Phineas Quass—for Appellants.

C. T. Le Quesne and Gerald Gardiner —
for Respondent.

Lord Justice Clauson — The two appellants in this matter are the only brothers of Ibrahim Elias Kotia, who died intestate and childless on 7th December 1937, a national of and domiciled and resident in the Lebanese State. The respondent is the widow of the deceased. The brothers claim that certain "mulk" land (i.e., land possessed in full ownership, *see* (1920) A C 743¹ at p. 746), of the deceased situate in Palestine ought to be divided in the proportions of nine twenty-fourths to each brother and six twenty-fourths to the widow, i.e., in accordance with the Sharia Moslem law prevailing in the Lebanese State: the widow on the contrary claims that the land in question ought to be divided in the proportions of one-quarter to each brother and one-half to the widow, proportions adopted in case of intestacy by the Ottoman law, and according to the arguments of the widow, applicable to the present case by virtue of the law of Palestine.

The District Court of Jaffa on 31st July 1938 ordered the issue of a certificate of succession in relation to the property in question and the moveables of the deceased in Palestine in accordance with the contention of the brothers, thus giving one-quarter to the widow. On 31st October 1938, the Supreme Court of Palestine, on appeal from the District Court, directed the order of the District Court to be set aside and an order substituted ordering a certificate of succession to issue giving (in accordance with the widow's contention) a one-half share in the mulk land to the widow and a one-quarter share to each of the two brothers. Although the certificate issued under the order of the District Court extended to moveables in Palestine, no question was raised either in

the Appellate Court or before their Lordships in regard to the deceased's moveables in Palestine. Before their Lordships the argument was confined to the question of succession to the deceased's immovables in Palestine, and it is this question alone which their Lordships have considered. The following are the provisions of the law of Palestine which are relevant to the matters in dispute:

The Palestine Order in Council, 1922.

Article 46. The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on 1st November 1914, and such later Ottoman Laws as have been or may be declared to be in force by Public Notice, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order, or may hereafter be applied or enacted; and subject thereto, and so far as the same shall not extend or apply, shall be exercised in conformity with the substance of the common law, and the doctrines of equity in force in England, and with the powers vested in and according to the procedure and practice observed by or before Courts of Justice and Justices of the Peace in England, according to their respective jurisdictions and authorities at that date, save in so far as the said powers, procedure and practice may have been or may hereafter be modified, amended or replaced by any other provisions.

Provided always that the said common law and doctrines of equity shall be in force in Palestine so far only as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit and subject to such qualification as local circumstances render necessary.

Article 51. Subject to the provisions of Arts. 64 to 67 inclusive jurisdiction in matters of personal status shall be exercised in accordance with the provisions of this Part by the Courts of the religious communities established and exercising jurisdiction at the date of this Order. For the purpose of these provisions matters of personal status mean suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, inhibition from dealing with property of persons who are legally incompetent, successions, wills and legacies, and the administration of the property of absent persons.

Article 58. The Civil Courts shall exercise jurisdiction over foreigners, subject to the following provisions:

Article 59. For the purpose of this part of the Order the expression "foreigner" means any person who is a national or subject of a European or American State or of Japan, but shall not include: (i) Native inhabitants of a territory protected by or administered under a Mandate granted to a European State. (ii) Ottoman subjects. (iii) Persons who have lost Ottoman nationality, and have not acquired any other nationality. The terms "subject" or "national" shall include corporations constituted under the law of a foreign State, and religious or charitable bodies or institutions wholly or mainly composed of the subjects or citizens of such a State.

Article 64. (i) Matters of personal status affecting foreigners other than Moslems shall be decided

1. (1920) 1920 A C 743, *Tsinki v. King's Advocate*.

by the District Courts, which shall apply the personal law of the parties concerned in accordance with such regulations as may be made by the High Commissioner, provided always that the Courts shall have no jurisdiction to pronounce a decree of dissolution of marriage until an ordinance is passed conferring such jurisdiction. (ii) The personal law shall be the law of the nationality of the foreigner concerned unless that law imports the law of his domicile, in which case the latter shall be applied. (iii) The District Court, in trying matters of personal status affecting foreigners, shall be constituted by the British President sitting alone. In trying matters of personal status affecting foreigners other than British subjects, the President may invite the Consul or a representative of the Consulate of the foreigner concerned to sit as an assessor for the purpose of advising upon the personal law concerned. In case of an appeal from a judgment in such a case the Consul or representative of the Consulate of the foreigner concerned shall be entitled to sit as an assessor in the Court of Appeal.

By the Palestine (Amendment) Order in Council, 1935, the following article was substituted for the original Art. 59 as from 1st April 1935.

59. For the purposes of this part of the Order, the expression 'foreigner' means any person who is not a Palestinian citizen.

Under powers contained in the Order in Council the Succession Ordinance, 1923, was established on 8th March 1923. The material provisions of that Ordinance as appearing in the current revised Ordinances are as follows:

Section 2. In this Ordinance, unless the context otherwise requires —

'foreigner' means any person who is a foreigner within the meaning of Article 59 of the Palestine Order in Council, 1922;

'immovable property' includes miri land and mulk land;

'mulk land' includes all heritable land or interests therein, not being miri land;

'the Ottoman law' means the provisional law relating to the succession to immovable property dated 3rd Rabi-ul-Awal 1331, as set forth in Sch. 2 to this Ordinance.

PART II. — JURISDICTION OF CIVIL COURTS.

Section 3. — (1) The civil Courts shall have exclusive jurisdiction in all matters relating to the succession to . . . every Palestinian citizen and any other person not being a foreigner:

Provided that such citizen or other person was not at the date of his death either a Moslem or a member of one of the religious communities.

(2) They shall also have exclusive jurisdiction in all cases in which a dispute arises as to the succession to, or the will of, a foreigner, other than a Moslem.

Section 4. Subject to the provisions of S. 21, a civil Court shall distribute successions within its jurisdiction according to the following rules:

(i) Where the deceased was a member of one of the religious communities and was not a foreigner the provisions of S. 11 shall apply.

(ii) Where the deceased was a Palestinian citizen and was not a member of one of the religious communities, the provisions of the Ottoman law shall apply, subject to any testamentary disposition made by the deceased.

(iii) Where the deceased was either a foreigner or, not being a foreigner, was neither a Palestinian citizen nor a member of one of the religious communities, the following rules shall apply: (a) mulk land and moveables of the deceased shall be distributed in accordance with the national law of the deceased; (c) where the national law imports the law of the domicile or the religious law or the law of the situation of an immovable, the law so imported shall be applied: Provided that, if the national law imports the law of the domicile and the latter provides no rules applicable to the person concerned, the law to be applied shall be the national law.

Section 11. In the administration and distribution of the estate of a deceased person who was a member of any of the religious communities and was not a foreigner, the civil Courts shall apply the following rules to regulate the distribution of his mulk and moveable property:

(d) in default of testamentary dispositions, or in so far as such dispositions do not extend, the property shall be distributed in accordance with the provisions of the Ottoman law contained in Sch. 2 to this Ordinance.

Schedule 1 to the Ordinance enumerates the recognized religious communities, one of which is the Eastern (Orthodox) Community. Schedule 2 sets out the Ottoman law relating to the inheritance of immovable property. It is sufficient to state that the effect of it is that upon the succession to a childless male leaving a widow and two brothers the widow's share is one-half and each of the brothers take one-quarter. The deceased appears to have belonged to the Eastern Orthodox religion: but it was not shown that he belonged to the Eastern (Orthodox) Community in Palestine. Indeed the appellants in their case submitted that he plainly did not. Their Lordships feel no doubt that the phrase "Eastern (Orthodox) Community" appearing in Sch. 1 to the Succession Ordinance, 1923, refers to the community in Palestine adhering to the Eastern (Orthodox) Church and that a person domiciled and resident outside Palestine does not fall within the description of a member of the Eastern (Orthodox) Community as used in the Ordinance merely because he is in fact an adherent of the Eastern (Orthodox) Church. That this is the correct view of the phrase is implied in the language used by Lord Tomlin in delivering their Lordships' judgment in (1920-88) Palestine L R 831² at page 848 on 9th October 1933.

2. (1934) 21 AIR 1934 PC 91: 149 IO 816: (1920-88) Palestine L R 831, Abdullah Bey Chedid v. Tenenbaum.

Before the District Court there was evidence as to the Lebanese law which, in the opinion of the appellate Court (from which their Lordships see no reason to differ) showed that in the case of immovable property situated outside the Lebanon, the Lebanese Courts would apply the law of the country where the immovable property was situated, that is, in this case, the law of Palestine. In the District Court the learned Judge held that the law to be applied to the succession not only to the moveables but also to the immovables in question (*viz.*, mulk land situated in Palestine) was the national law of the deceased, *i. e.*, the Lebanese law. He treated the evidence as establishing that the national law in Lebanon is Moslem Sharia law, and he accordingly ordered a certificate of succession to issue giving six shares to the widow and nine shares to each of the brothers. In arriving at this decision the learned Judge appears (as pointed out by the Court of Appeal) to have ignored the evidence. It was argued at one time before their Lordships by counsel for the appellants that they ought to have a further opportunity of questioning this evidence: but it does not appear that any application for leave to tender further evidence was made either to the District Judge or to the appellate Court: and their Lordships must accordingly deal with the evidence as it stands.

Before the appellate Court and again before their Lordships, it was argued that, for the purposes of the application of the Succession Ordinance, the deceased must not be treated as a foreigner. It was suggested that he was excluded from the definition of foreigner in Art. 59 of the Order in Council of 1922 since he was, it was said, a native inhabitant of a territory (*scil.* the Lebanon) administered under a mandate granted to a European State. Whether or not this might have been so had the Order in Council remained in its original form, their Lordships see no reason to differ from the view of the appellate Court that since the amending Order in Council of 1935 came into force the term "foreigner" in the Succession Ordinance, 1923, must be read with reference to the new Art. 59 substituted for the former Art. 59 by the amending Order in Council. This question is, however, of no importance in view of the fact that the deceased was not, and was not suggested by either side to be, a Palestinian citizen. The effect of S. 4 (iii) of the Ordinance is that where (as in the present case) the deceased was neither a Palestinian citizen nor a mem-

ber of one of the religious communities his mulk land, whether he be a foreigner or not, is to be distributed in accordance with the national law of the deceased, and where the national law imports the law of the domicile or the law of the situation of the land the law so imported is to be applied. On the evidence the appellate Court in their Lordships' opinion rightly held that the national law of the deceased (*i. e.*, the Lebanese law) imported the law of the situation of the land. The appellate Court stated the result to be that the law applicable is the law of Palestine and added that in accordance with that law it is not disputed that the widow is entitled to a half share.

Their Lordships agree in the conclusion thus reached by the appellate Court: but, in view of the fact that counsel for the appellants in fact disputed before their Lordships that, in this particular case, the law of Palestine was the Ottoman law, which admittedly would give the widow a half share, it is desirable to explore the matter somewhat further. It was argued, and it is true, that the law of intestate succession to mulk land in Palestine is not uniform. The distribution is governed, in the case of mulk land owned by a Palestinian citizen who was not a member of one of the religious communities specified in the Ordinance, by Ottoman law by virtue of Sec. 4 (ii) of the Ordinance. It is governed in the case of mulk land owned by a member of one of the religious communities, who was not a foreigner, by Ottoman law by virtue of Sec. 11 (d) of the Ordinance. It is governed in the case of mulk land owned by a deceased person who neither is a Palestinian citizen nor a member of one of the communities by the national law of the deceased. It was then argued that the only reasonable construction to be placed upon the phrase "the national law of the deceased" in S. 4 (iii) (a) of the Ordinance is "the law which the Courts of the nationality of the deceased would apply to the intestate succession to land of their own nationals in their own country," *scil.*, in the present case the Sharia law which would give the widow only a quarter share: and that unless this construction is placed upon the Ordinance, there results a "*circulus inextricabilis*," the Lebanese law referring the matter back to the local law, the local law referring the matter back to the law of nationality, and so on *ad infinitum*.

Their Lordships would hesitate long before construing the words "the national law

of the deceased" as meaning "the law which the Courts of the nationality of the deceased would apply to the intestate succession to land belonging to their own nationals situate in their own country." Such a construction would construe the Ordinance as deliberately cutting across the principle recognized by Scrutton L. J., in (1918) L R P 89³ at p. 106, (a dissenting judgment which was however approved by the House of Lords upon appeal in the same case, (1919) A C 145⁴ at page 151) by Luxmoore J., (1930) 1 Ch 377⁵ and by Maugham J., (1930) 2 Ch 259,⁶ which their Lordships venture to state as follows: That in the English Courts phrases which refer to the national law of a *propositus* are *prima facie* to be construed not as referring to the law which the Courts of that country would apply in the case of its own national domiciled in its own country in regard (where the situation of the property is relevant) to property in its own country, but to the law which the Courts of that country would apply to the particular case of the *propositus*, having regard to what in their view is his domicile (if they consider that to be relevant) and having regard to the situation of the property in question (if they consider that to be relevant). Their Lordships accordingly approach the question of the construction of S. 4 of the Ordinance on the footing that this view of the *prima facie* meaning of the phrase "the national law of the deceased" is (as in their Lordships' opinion it is) the correct one. On examining the whole of the section their Lordships, so far from finding grounds for modifying their *prima facie* view, find confirmation of it in the wording of cl. (c) of the section which clearly contemplates that the national law to which reference is made may import the law of the domicile or the law of situation of an immovable. If the phrase "the national law of the deceased" is to be construed (contrary to their Lordships' view) to mean "the law which the Courts of the deceased's nation would apply in the case of its own national domiciled in its own country in relation to land in its own country" it is not easy to account for the reference to the possible importation of

the law of the domicile or the law of the situation of an immovable.

As regards the suggestion made by counsel for the appellants that it was an objection to the construction of the section which their Lordships prefer that it would result in a "*circulus inextricabilis*" their Lordships feel no difficulty. It must be borne in mind that the primary question for their Lordships is, what is the law of Palestine as to the devolution on the death of the deceased intestate of this particular piece of land: to this, as their Lordships have pointed out above, the answer is that the enacted law of Palestine provides, on its true construction, that the devolution of this particular piece of land, in the circumstances stated, is to be such as the Courts of the nationality of the deceased (*viz.*, the Lebanese Courts) would determine it to be if this question were before them. (It may be observed that in the present case there is no question of the presence in the Lebanese law of any provision of a character which the Palestinian Court might properly consider itself precluded from applying. Examples of such possible provisions are given by Maugham J., (1930) 2 Ch 275,⁷ but need not be considered for the purposes of the present case.) The second question is one of fact, namely what would the Lebanese Courts determine to be the devolution of this particular piece of land in the circumstances stated? The evidence shows that the Lebanese Court would determine that the Palestine law, being the law of the situation governs the matter. In other words, the law of Palestine, as applied to this particular case, is found to be that although the deceased is a national of the Lebanese State, there is nothing in the law of the Lebanese State to interfere with the application to the case of the law of Palestine, being the law of the situation of the property in question. The Palestine Court must (in accordance with the views expressed by Scrutton L. J., in (1918) L R P 89³) be taken to accept the *renvoi* and applies its own law, as applicable to the case of a Palestinian citizen, which, whether the case falls within sub-s. (i) or sub-s. (ii) of S. 4 of the Succession Ordinance 1923 (and it must fall within one or the other) provides for the application of the provisions of the Ottoman law.

One further point remains. It was urged by counsel for the appellants that there

3. (1918) 1918 L R P 89 : 87 L J P 73, *Casdagli v. Casdagli*.

4. (1919) 1919 A C 145 : 88 L J P 49 : 120 L T 52 : 68 S J 39 : 35 T L R 80, *Casdagli v. Casdagli*.

5. (1930) 1 Ch 377 : 99 L J Ch 67 : 142 L T 189 : 46 T L R 61, *In re Ross*.

6. (1930) 2 Ch 259 : 99 L J Ch 466 : 143 L T 616 : 46 T L R 539, *In re Askew*.

7. (1930) 2 Ch 275, *In re Askew*.

cannot be said to be any law of the situation of the property. It was said that the Succession Ordinance, 1923, provides such a law for mulk land belonging to a member of one of the specified religious communities, and for like land belonging to a Palestinian citizen : but that as regards land belonging to anyone else, whether a foreigner, or, not being a foreigner, a person was neither a Palestinian citizen nor a member of one of the specified religious communities there is only the law enacted by S. 4 (iii) and that the words "the law of the situation" of an immovable, as used in that sub-section cannot be construed as repeating the section over again, but must refer either to something else or to something which does not exist. In view of the opinion expressed above it follows that the alleged gap does not exist; but in any event, it

appears to their Lordships, as at present advised, but without deciding the point, that any such gap as is alleged would be filled by the operation of S. 46 of the Palestine Order in Council, 1922.

In the result, their Lordships are of opinion that the decision under appeal correctly ordered a certificate of succession to be issued giving to the widow of the deceased 12 shares out of 24 in the mulk property in Jaffa. Their Lordships will humbly advise His Majesty that the appeal be dismissed. The appellants will be ordered to pay the respondent's costs of the appeal.

G.N./R.K.

Appeal dismissed.

Solicitors for Appellants — *T. L. Wilson & Co.*

Solicitors for Respondent —
Wylie Patterson & Herring.

END

THE
ALL INDIA REPORTER

1941

FEDERAL COURT SECTION

WITH PARALLEL REFERENCES TO
1940 FEDERAL COURT REPORTS AND
OTHER JOURNALS IN INDIA



CITATION : (28) A. I. R. 1941 FEDERAL COURT



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NAGPUR, C. P.

1941

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TO
THE LEGAL PROFESSION
IN GRATEFUL RECOGNITION OF
THEIR WARM APPRECIATION AND SUPPORT

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FEDERAL COURT OF INDIA

1941

Chief Justice :

The Hon'ble Sir Maurice Linford Gwyer, Kt., K.C.B., Bar-at-law.

Puisne Judges :

The Hon'ble Sir Shah Muhammad Sulaiman, Kt., M.A., LL.D., Bar-at-law.

„ Sir Srinivasa Varadachariar, Kt., B.A., B.L., Rao Bahadur.

„ Sir Muhammad Zaffar Ullah Khan, K.C.S.I., LL.D., Bar-at-law.

„ Sir John William Fisher Beaumont, Kt., K.C., M.A. (*Cantab*),
Bar-at-law (*Acting*).

Advocate-General :

Sir Brojendra Lal Mitter, K.C.S.I.

NOMINAL INDEX

Atiqa Begum, Mt. v. United Provinces	70	Subrahmanyam Chettiar v. Muttuswami	
**Hindu Women's Rights to Property Act, 1937, In the matter of	72	Goundan	69
*Lachmeshwar Prasad v. Keshwar Lal	5	*Subrahmanyam Chettiar v. Muttuswami	
**Prithwi Chand Lal Choudhury v. Sukhraj		Goundan	47
Rai and Subhanand Chowdhary v. Apurba			
Krishna Mitra	1	**United Provinces v. Mt. Atiqa Begum	16

COMPARATIVE TABLES

A. I. R. 1941 Federal Court = Other Journals

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	1940 M W N 1197	5 con	1941-1 MLJ Sup 49	47 con	1941 M W N 100	70	1941 O W N 799
7	BR 191	20	Pat 429	192	IC 225	45	CWNFC 90
1940-3	FLJFC 67	1940	FOR 84	7	BR 523	194	IC 246
1940	OLR 681	1941	OLR 82	45	CWNFC 1	1941-4	FLJFC 18
191	IC 1	ILR	1941 KFC 1	22	PLT 155	73	CLJ 431
53	MLW 50	16	1941 OLR 121	73	CLJ 1	1941	OLR 451
1941	OWN 35	192	IC 138	1941	OWN 425	7	BR 765
22	PLT 87	7	BR 433	1941	AWR Rev 192	1941	M W N 618
1941	AWR FC 1	45	CWNFC 27	1941-1	MLJ Sup 1	1941	AWR Rev 608
43	PLR 134	1941	OWN 297	1940	FOR 188	22	PLT 659
20	Pat 298	1941	AWR FC 3	ILR	1941 KFC 25	ILR	1941 KFC 143
45	CWNFC 93	1940-3	FLJFC 97	69	1941 O W N 793	72	22 PLT 469
1940	FOR 78	1941	AWR Rev 109	194	IC 225	45	CWNFC 81
1941-1	MLJ Sup 45	72	CLJ 550	1941-4	FLJFC 16	194	IC 857
74	CLJ 90	1941	ALJ 170	73	CLJ 429	73	CLJ 415
191	IC 659	53	MLW 397	43	PLR 434	1941	M W N 556
7	BR 362	1941-1	MLJ Sup 65	1941	OLR 454	1941	OLR 477
1940-3	FLJFC 73	1941	M W N 581	7	BR 764	7	BR 783
22	PLT 119	1940	FOR 110	1941	AWR Rev 607	1941-2	MLJ 12
1941	M W N 136	22	PLT 578	1941-2	MLJ 33	54	MLW 22
1941	AWR FC 39	ILR	1941 KFC 72	54	MLW 61	1941	OWN 880
1941	OWN 372	47	1941 OLR 157	45	CWNFC 96	ILR	1941 KFC 143
45	CWNFC 66	53	MLW 109	ILR	1941 KFC 141	1941	AWR Rev 643
73	CLJ 51	1940-3	FLJFC 157	22	PLT 697	1941-4	FLJFC 1
53	MLW 373			1941	M W N 566		

OTHER JOURNALS = ALL INDIA REPORTER

1940 Federal Court Reports = All India Reporter

FC	AIR	FC	AIR	FC	AIR	FC	AIR	FC	AIR
1	1940 FC	1	12 1940 FC	4	31 1940 FC	7	71 1940 FC	19	84 1941 FC
7	" "	3	15 " PC	54	39 " "	10	75 " "	25	110 " "
10	" "	5	17 " FC	26	61 " "	20	78 1941 "	1	188 " "
1941 ALJ		43 PLR		(1941) 2 MLJ		1941 OLR		7 BR	
ALJ	AIR	PLR	AIR	MLJ	AIR	OLR	AIR	BR	AIR
170	1941 FC 16	484	1941 FC 69	12	1941 FC 72	82	1941 FC 5	488	1941 FC 16
1941 AWR (FC)		134	" " 1	38	" " 69	121	" " 16	528	" " 47
AWR		191 IC		53 MLW		157	" " 47	764	" " 69
1	1941 FC 1	IC	AIR	MLW	AIR	451	" " 70	765	" " 70
8	" " 16	1	1941 FC 1	50	1941 FC 1	454	" " 69	788	" " 72
39	" " 5	659	" " 5	109	" " 47	477	" " 72	22 PLT	
1941 AWR (Rev)		192 IC		373	" " 5	1941 OWN		PLT	AIR
AWR		IC		397	" " 16	OWN	AIR	87	1941 FC 1
109	1941 FC 16	IC	AIR	54 MLW		85	1941 FC 1	119	" " 5
192	" " 47	188	1941 FC 16	MLW		297	" " 16	155	" " 47
607	" " 69	225	" " 47	MLW		372	" " 5	469	" " 72
608	" " 70	194 IC		22 1941 FC 72		425	" " 47	578	" " 16
648	" " 72	IC		61 " " 69		798	" " 69	659	" " 70
73 CLJ		225	1941 FC 69	1941 MWN		799	" " 70	697	" " 69
OLJ	AIR	246	" " 70	MWN		880	" " 72	ILR 1941 Kar (FC)	
1	1941 FC 47	357	" " 72	ILR 20 Pat		ILR		1	1941 FC 5
51	" " 5	(1941) 1 MLJ (Sup)		ILR		AIR		25	" " 47
415	" " 72	MLJ		298 1941 FC 1		AIR		72	" " 16
429	" " 69	1 1941 FC 47		429 " " 5		7 BR		141	" " 69
481	" " 70	45 " " 1		556 " " 72		BR		148	" " 70
74 CLJ		49 " " 5		566 " " 69		AIR		148	" " 72
CLJ	AIR	65 " " 16		581 " " 16		191 1941 FC 1		165	1942 " 8
90	1941 FC 1	618 " " 70		618 " " 70		362 " " 5		176	" " 1

SUBJECT INDEX

Bihar Money-lenders (Regulation of Transactions) Act (7 of 1939), S. 7—Contention before High Court based on S. 11, Bihar Money-lenders Act (3 of 1938) — High Court declaring aforesaid section to be ultra vires — During pendency of appeal to Federal Court Act, 3 of 1938 repealed and re-enacted as Act 7 of 1939 — Federal Court held entitled to take into account S. 7 of new Act which replaced S. 11 of old Act: 5c
 —S. 7 — Construction — Hindu joint family—Out of sum actually advanced only smaller sum found for family necessity and therefore legally recoverable — Interest under S. 7 should not exceed amount actually advanced and not amount found legally recoverable 5f

Civil Procedure Code (5 of 1908), S. 151 and O. 41, R. 20—R. 20 is not exhaustive — Inherent powers can be exercised (Per Sulaiman J.) 16h

*—O. 1, R. 10 — Suit involving question of validity of statute affecting scope of executive authority of Province — Advocate-General is proper party 16b

—O. 1, R. 10—Necessary party and proper party explained (Per Sulaiman J.): 16g

—O. 45, R. 8—Application to High Court for leave to appeal to Federal Court — Application must be deemed to be pending even after grant of certificate under S. 205, Government of India Act—But, after admission of appeal by High Court, matter becomes open to Federal Court — Declaration by High Court that appeal is admitted is not mere ministerial or administrative act but is its final judicial act—So long as O. 45, R. 8 remains applicable, appellant cannot come to Federal Court without admission of his appeal by High Court — Though Federal Court under O. 37, R. 1 of the Federal Court Rules, can direct matters of practice and procedure as it thinks fit but such directions cannot supersede O. 45, Civil P. C., so as to obviate necessity of High Court directing appeal to be admitted 5a

****Federal Court — Practice — Review** — Principles governing powers of review are similar to those of Privy Council and House of Lords — No re-hearing can be allowed on merits — Exceptional circumstances in which review can be allowed, stated 1

Government of India Act (1935, 25 & 26 Geo. V, Ch. 42), S. 100 and Sch. 7, Lists I, II and III — Maxim, *generalibus specialia derogant* cannot be applied to Sch. 7, Lists I, II and III — Fullest scope of S. 100, explained (Per Sulaiman J.): 47e

—Ss. 100 and 107 (1) — Words "with respect to" in S. 100 cover incidental encroachment — But such encroachment is permissible only when field is actually unoccupied (Per Sulaiman J.) 47h

—S. 100 (1) and (3) — Rule of construction, stated (Per Gwyer C. J. and Varadachariar J.) 47a

—S. 104 and Sch. 7, Lists I, II and III —Determination as to in which category of Lists I, II and III matters, with which particular Act deals, fall—Resort to S. 104 can only be had after all categories are exhausted (Per Sulaiman J.) 47d

—S. 104 — Powers to legislate on particular subject includes powers to legislate for validating executive orders in respect of that subject (Per Gwyer C. J.) 16f

—Ss. 107 and 316 — Words "Federal law" mean law passed by Federal Legislature — Words "competent to enact" in S. 107 cover matters in Lists I and III (Per Sulaiman J.) 47g

*—S. 176 — Proprietary rights of Province not affected — Advocate-General should represent executive Government — Province should not be made party (Per Gwyer C. J.) 16a

*—S. 205 — High Court making Provincial Government party to appeal with idea that that would give them right to appeal to Federal Court on constitutional question—Government being party to appeal have right to appeal to Federal Court (Per Sulaiman and Varadachariar JJ., Gwyer C. J., Dissenting) 16i

*—S. 205 (1) and (2)—Appellant wishing to take grounds in appeal other than constitutional one—Certificate under S. 205 (1) is not sufficient — He must obtain further certificate under O. 45, R. 3, Civil P. C.: 5d

—S. 205—Appeal to Federal Court from High Court's decree — Matter appealed against becomes sub judice again — Federal Court has seisin of whole case except for certain purposes 5e

Government of India Act

— *Ss 208 (b), 292* — Leave to appeal to His Majesty can be granted only where matter is of importance and there is substantial question to be determined — Construction of S. 292, Government of India Act by Federal Court held did not involve substantial question on which leave could be granted — Privy Council's decision sought to be obtained in case not likely to affect future litigation — Case cannot be said to involve question of general public importance and hence leave should be refused: 70a

— *S. 208 (b)* — High Court declaring U. P. Act 14 of 1938 to be ultra vires — Plaintiff affected by decree not appealing — Appeal by U. P. Government — Plaintiff questioning maintainability of appeal — Federal Court holding appeal to be competent and U. P. Act to be intra vires but not disturbing High Court's decree in plaintiff's favour — Application by plaintiff for leave to appeal to His Majesty — Question of maintainability of appeal held was of importance only to clients in case and as Federal Court did not disturb High Court's decree in petitioner's favour aforesaid question did not justify grant of leave 70b

— *S. 208 (b)* — Leave to appeal to His Majesty can be granted only in cases of real importance, cases which are likely to affect large number of interests in future or which involve difficult questions of law — Federal Court holding S. 19, Madras Agriculturists' Relief Act, to be valid — Decision dealing with scaling down of decrees obtained before aforesaid Act came into force — Leave held should be refused as decision was concerned with section which would not apply in future, number of decrees passed before Act was limited and amount in dispute did not exceed Rs. 4000 69

* — *S. 214 (4)* — Dissenting Judge can state reasons separately even on points of concurrence (Per Sulaiman J.) 47c

* — *S. 292* — S. 292 does not prohibit Indian Legislatures to pass retrospective legislation 16c

** — *S. 292* — U. P. Regularization of Remissions Act (14 of 1938) is not ultra vires U. P. Legislature and not opposed to S. 292: I L R (1940) All 455 = ('40) 27 A I R 1940 All 272 = 188 I C 586 (FB), REVERSED 16n

— *Sch. 7* — Lists — Interpretation — Court must consider Act as a whole 16l

— *Sch. 7, Lists II and III* — No item to be read in restricted sense 16d

Government of India Act

* — *Sch. 7, List II, Items 2 and 21* — "Collection of rents" includes remission of rents also 16e

Hindu law — Debts — Father — Antecedent debt — Mortgage by father to pay off earlier mortgage executed to satisfy debt under pronote — Debt under pronote is antecedent debt at the date of earlier mortgage — Later mortgage to pay off earlier mortgage is valid — Onus to prove debt under pronote as being "avyavaharika" and its extent is on sons 5g

** **Hindu Women's Rights to Property Act (18 of 1937), S. 3** — Act cannot be questioned by reason of S 317, Constitution Act, on ground that it was introduced into Legislature and passed by Legislative Assembly before Part 3, Constitution Act, came into force — Fact that powers of Legislature changed during passage of Bill from Legislative Assembly to Council of State is immaterial — Only date material for considering validity of Act is 14th April 1937 when Governor-General's assent was given 72a

** — *S. 3* — Principles of construction stated — Word "property" as used in Act does not include agricultural land — Act is not ultra vires 72b

** — *S. 3 (as amended by Act 11 of 1938)* — Act does not regulate succession to agricultural land in Governor's provinces — It regulates devolution by survivorship of property other than agricultural land — Subject of devolution by survivorship of aforesaid property is included in entry 7, List 3 of Government of India Act 72d

Interpretation of Statutes — General words in statute — Narrow construction to bring words within Legislature's competence leaving Act with nothing in it or Act different in kind and not merely in degree — Whole Act must be held invalid — Narrow construction leaving Act complete, valid and executable by itself — Act must be upheld 72c

— Part of Act can be held invalid if severable — If not severable whole Act is ultra vires 47f

— Two interpretations possible — One less likely to produce impracticable results must be accepted (Per Sulaiman J.) 16j

— Repeal — It can be express or implied — When repeal is implied explained (Per Sulaiman J.) 16k

— Retrospective effect — Statutes affecting vested rights must be construed strictly 16m

Madras Agriculturists' Relief Act (4 of 1938), Ss. 8 and 19—Whether legislation is with respect to matters in Sch. 7, List I or List II, Government of India Act — Pith and substance of impugned statute or its true nature and character should be looked to — Pith and substance of Madras Agriculturists' Relief Act cannot be said to be legislation with respect to negotiable instruments or promissory notes—Fact that most debts with which it deals are based on or evidenced by such instruments is immaterial — Act does not invade forbidden field of Sch. 7, List I, Government of India Act, and therefore is intra vires of Provincial Legislature—Section 19 is limited to decrees and therefore its provisions affecting operation or effect of decree cannot be said to

Madras Agriculturists' Relief Act relate to negotiable instruments—Section 8 only lays down mode of calculation of amount to which decree is to be scaled down — Consequently, Ss. 19 and 8 do not affect Ss. 32 or 79, Negotiable Instruments Act, and are not ultra vires (Per *Gwyer C. J.*, and *Varadachariar J.*; *Sulaiman J.*, contra) 47b

Practice — Federal Court — Advocate-General intervening is not entitled to costs 47i

*—Appeal—Powers of appellate Court — Subsequent events — Appeal is by way of rehearing — Appellate Court can consider even facts and events coming into existence after decree appealed against 5b

CASE REVERSED

IN

(28) A. I. R. 1941 FEDERAL COURT

Atiqs Begam, Mt. v. Abdul Maghni Khan, (1940) I L R 1940 All 455 = 1940 A L J 274 = 1940 A W R H C 208 = (1940) 3 F L J H C 83 = (27) A I R 1940 All 272 = 188 I C 586 (F B) Reversed in (28) A I R 1941 F C 16..

THE ALL INDIA REPORTER 1941

Federal Court of India

* * A. I. R. 1941 Federal Court 1
(From Patna)

14th October 1940

GWYER C. J., SULAIMAN AND
VARADACHARIAR JJ.

Raja Prithwi Chand Lal Choudhury
— Applicant

v.

Sukhraj Rai and others — Respondents.
and

Subhanand Chowdhary and another —
Appellants

v.

Apurba Krishna Mitra and another —
Respondents.

Review Applns. in Case Nos. 15 and 18
of 1939, from judgments of Federal Court,
Reported in A I R 1940 F C 25 and A I R
1940 F C 7, respectively.

*** Federal Court—Practice—Review — Princi-
ples governing powers of review are similar to
those of Privy Council and House of Lords —
No re-hearing can be allowed on merits — Excep-
tional circumstances in which review can be
allowed, stated.*

The Federal Court will not sit as a Court of
appeal from its own decisions, nor will it entertain
applications to review on the ground only that one
of the parties in the case conceives himself to be
1941 FC/1a

aggrieved by the decision. The rules which govern
the practice of the Judicial Committee and of the
House of Lords in matters of review govern the
practice of the Federal Court as well in India.
Consequently no case in the Federal Court can be
re-heard and an order once made is final and can-
not be altered. Nevertheless, in exceptional cir-
cumstances, an application for review can be
entertained. The Federal Court will exercise its
power of review for the purpose of rectifying mis-
takes which have crept in by misprision in embo-
dying the judgments, or have been introduced
through inadvertence in the details of judgments. It
can also supply manifest defects in order to enable
the decrees to be enforced, or add explanatory mat-
ter, or reconcile inconsistencies. The indulgence by
way of review is granted mainly owing to the
natural desire to prevent irremediable injustice
being done by a Court of last resort as where by
some accident, without any blame, the party has
not been heard and an order has been inadvertently
made as if the party had been heard. But in no
case however can a re-hearing be allowed upon the
merits or even on the ground that new matter has
been discovered, which, if it had been produced at
the hearing of the appeal, might materially have
affected the judgment of the Court : (1886) 11 A O
660; (1836) 1 Moo P O 117; (1871) L R 3 P O 664
and 14 Mad 489 (PO), *Rel. on.* [P 2 O 1, 2]

Case No. 15 — Appellant by Rajeshwari Pershad
and G. Sahai.
Respondent *ex parte*.

Case No. 13 — Appellant in person.
Respondent *ex parte*.

Judgment. — These are two ex parte applications for a review of judgments delivered by this Court on 18th March last. They are the first applications of the kind which have come before us, and it is desirable that we should state the principles which the Court will take for its guidance in deciding them. This Court will not sit as a Court of appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. It would in our opinion be intolerable and most prejudicial to the public interest if cases once decided by the Court could be re-opened and re-heard :

There is a salutary maxim which ought to be observed by all Courts of last resort — *interest reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants, but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this: (1886) 11 A C 660¹ at p. 664.

This Court is not, it is true, a Court of last resort in the sense in which the Judicial Committee or the House of Lords may be so described in the United Kingdom; but it is the highest tribunal sitting in this country and no appeal lies without leave from any decision given by it in the exercise of its appellate jurisdiction. The High Courts in British India have been given a limited power to review their judgments by S. 114 and O. 47, Sch. 1, Civil P. C. This Court has power under S. 214 (1), Constitution Act to make rules of Court for regulating generally the practice and procedure of the Court; but it has made no rules for regulating applications for a review of its judgments, and in these circumstances it is unnecessary to consider whether its rule-making power is wide enough to enable it to assume a general jurisdiction for that purpose, in the absence of express statutory provisions such as are to be found in S. 114 of the Code. If at the present moment it has power to review its own judgments, that power should not, in our opinion, be regarded as more extensive than the power exercised for the same purpose by the Judicial Committee and should be subject to similar restrictions; and we conceive that the rules which govern the practice of the Judicial Committee and of

the House of Lords in these matters may rightly be taken as a guide to the practice of this Court also. The practice in England is well settled and of long standing. In (1836) 1 Moo P C 117,² Lord Brougham delivering the judgment of the Judicial Committee said :

It is unquestionably the strict rule, and ought to be distinctly understood as such, that no cause in this Court can be re-heard, and that an order once made, that is a report submitted to His Majesty and adopted, by being made an order in Council, is final and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parliament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal in this country. Whatever therefore has been really determined in these Courts must stand, there being no power of re-hearing for the purpose of changing the judgment pronounced; nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by Common law, the same power which the Courts of record and statute have of rectifying the mistakes which have crept in . . . The House of Lords exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have however gone a step further, and have corrected mistakes introduced through inadvertence in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or have added explanatory matter, or have reconciled inconsistencies. But with the exception of one or two cases in 1669, of doubtful authority, here, and another in Parliament of still less weight in 1642 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced.

And, after giving instances in which the power of rectifying mistakes and errors had been exercised, he continued :

It is impossible to doubt that the indulgence extended in such cases is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of last resort, where by some accident, without any blame, the party has not been heard and an order has been inadvertently made as if the party had been heard.

In (1871) L R 3 P C 664,³ the respondent had petitioned for a re-hearing on the ground that the appeal had been heard ex parte because of his want of means to brief counsel and his own inability to argue the case, and also because the judgment of the Judicial Committee in the appeal was at

1. (1886) 11 A C 660 : 10 Mad 73 : 13 I A 155 : 4 Saz 755 (P C), Venkata Narasimha Appa Row v. Court of Wards.

2. (1836) 1 Moo P C 117 : 2 M I A 181 : 1 Sar 175 (P C), Rajunder Narain Rae v. Bijai Govind Singh.
3. (1871) L R 3 P C 664, Hebbert v. Purchas.

variance with former decisions of the Committee; but the Lord Chancellor (Lord Hatherley), delivering the judgment of the Committee, said:

Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion that expediency requires that the prayer of the petitions should not be acceded to, and that they should be refused with costs.

The general principle remains as it was enunciated a century ago. It is recognized by the Judicial Committee that in certain exceptional circumstances an application for a re-hearing may be entertained, but the cases in which this will be done have not been substantially enlarged since they were explained by Lord Brougham in the passage already cited, though Lord Watson, delivering the judgment of the Judicial Committee in 14 Mad 439⁴ included cases where some misprision had occurred,

as for instance, the terms of the decree adjudicating something which had not been in the view of their Lordships' board, or which they had not had the means of deciding, or where the decree did not carry out the terms of the judgment.

In no case however has any re-hearing been allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the Committee: (1886) 11 A C 660.¹ We turn now to the facts of the two cases which are before us. In the first case counsel for the appellant informed us at the original hearing that the only point which he desired to argue was the application of a certain section in an Act of the Bihar Legislature. This point had not been raised at any previous stage of the litigation and the particular section was not even mentioned in the petition of appeal. We saw no reason in these circumstances for giving leave to amend the petition, and the appeal was accordingly dismissed with costs. The application for review which was subsequently filed alleged that the appellant was prejudiced on account of the laches of the respondents in appearing and filing a statement of their case on the day of the hearing of the appeal. At the hearing of the application however counsel relied mainly upon another ground viz., that the judgment of the High

Court on the application for a certificate under S. 205, Constitution Act, was not produced before this Court when the appeal was heard. We have now seen the judgment of the High Court, the existence and indeed the terms of which must have been known to the parties or their advisers when the appeal was heard, and there is nothing in it which could be of the slightest assistance to the applicant. As to the alleged laches of the respondents, an appellant must succeed by the merits of his own case and not by the laches of his opponents; and it is hard to see how the present applicant could have been prejudiced, since his appeal was dismissed without the respondents being called upon to argue the merits of the case. The applicant is in effect inviting this Court to re-hear his appeal upon the merits, because he thinks that the Court was in error in dismissing it. There is in our opinion no justification for the application and it should never have been filed.

In the second case the applicant appeared in person and submitted a written argument. He had been in the main successful on those points which were argued on the appeal, but he appears to be of opinion that the interest which he was ordered to pay on the reduced amount of his debt should have been fixed at a lower rate. He complained also of the conduct of his Agent in not communicating with him early enough with regard to the date when the appeal was to be heard and in applying to the Court too late for an adjournment. There may be some substance in his complaint against the Agent, but it is not a matter with which this Court can deal on the present application. He desired to take points which were not argued by his counsel at all in the High Court or this Court; and he also alleged that his counsel was not properly instructed and so could not present his case fully at the hearing before us. If counsel had felt that he could not do justice to his client's case without a further study of his instructions, he would doubtless have asked for the indulgence of the Court; but no such request was made, and it is a matter for counsel's discretion how a case is presented to the tribunal and which points are pressed or abandoned. This applicant also is asking us to re-hear the whole appeal upon the merits.

The power which we are invited to exercise in these two cases is one to be exercised with extreme caution and only in very ex-

4. (191) 14 Mad 439 : 17 I A 184 (P C), *Srimantu Raja Yarlagaddu Durga v. Srimantu Mallikarjuna*.

ceptional cases ; and applications for its exercise will not be encouraged by this Court. Neither applicant has brought himself, even remotely, within any of the exceptions to the general rule. Both applications are dismissed ; and we think it right to say

that future applications of the kind will run the risk of receiving more summary treatment.

G.N./R.K.

Applications dismissed.

* A. I. R. 1941 Federal Court 5

(From : Patna)

GWYER C. J., SULAIMAN AND
VARADACHARIAR JJ.Lachmeshwar Prasad Shukul and others
— Appellants

v.

Keshwar Lal Chaudhuri and others —
Respondents.Case No. 3 of 1940, Decided on 6th
December 1940.

(a) Civil P. C. (1908), O. 45, R. 8—Application to High Court for leave to appeal to Federal Court — Application must be deemed to be pending even after grant of certificate under S. 205, Government of India Act — But after admission of appeal by High Court matter becomes open to Federal Court — Declaration by High Court that appeal is admitted is not mere ministerial or administrative act but its final judicial act — So long as O. 45, R. 8 remains applicable, appellant cannot come to Federal Court without admission of his appeal by High Court—Though Federal Court under O. 37, R. 1, Federal Court Rules, can direct matters of practice and procedure as it thinks fit but such directions cannot supersede O. 45, Civil P. C., so as to obviate necessity of High Court directing appeal to be admitted.

The proceedings must be deemed to be pending in the High Court so long as there is a mere application for leave to appeal, even though the certificate required by S. 205, Government of India Act, has been granted. But as soon as the required amounts have been deposited to the satisfaction of the High Court, and the High Court has declared the appeal "admitted," the matter becomes open to the Federal Court. After the admission the appeal passes out of the absolute control of the High Court. The declaration that the appeal is admitted is not a mere ministerial or administrative act but must be regarded as the final judicial act of the High Court.

[P 7 C 2 ; P 8 O 1]

Consequently so long as O. 45, R. 8 remains applicable an appellant cannot come to the Federal Court without his appeal having been admitted by the High Court. Although under O. 37, R. 1, Federal Court Rules, the Federal Court undoubtedly has full power to excuse compliance with any of the rules of the Federal Court, and can give such directions in matters of practice and procedure as it shall consider just and expedient, it is extremely doubtful whether such 'directions' can be in supersession of O. 45, Civil P. C., in the absence of any rules amending it, so as to dispense with the necessity of the High Court directing the appeal to be admitted.

[P 8 O 1, 2]

(b) Practice — Appeal — Powers of appellate Court—Subsequent events—Appeal is by way of re-hearing—Appellate Court can consider even facts and events coming into existence after decree appealed against.

The hearing of an appeal under the procedural law of India is in the nature of re-hearing and therefore in moulding the relief to be granted in a case on appeal, the appellate Court is entitled to take into account even facts and events which have come into existence after the decree appealed against. Consequently, the appellate Court is competent to take into account legislative changes since the decision in appeal was given and its

1941 F.O./1b 2 & 3a

powers are not confined only to see whether the lower Court's decision was correct according to the law as it stood at the time when its decision was given : English, American and Indian case law discussed. [P 12 C 2 ; P 13 C 2 ; P 14 C 1]

(c) Bihar Money-lenders Act (7 of 1939), S. 7 — Contention before High Court based on S. 11, Bihar Money-lenders Act (3 of 1938) — High Court declaring aforesaid section to be ultra vires — During pendency of appeal to Federal Court Act 3 of 1938 repealed and re-enacted as Act 7 of 1939 — Federal Court held entitled to take into account S. 7 of new Act which replaced S. 11 of old Act.

One of the contentions raised before the High Court was based on S. 11, Bihar Money-lenders Act, 3 of 1938. The High Court declared 'aforesaid S. 11 to be ultra vires.' During the pendency of the appeal to the Federal Court, the Bihar Money-lenders Act, 3 of 1938, was repealed and re-enacted as Act 7 of 1939. On the basis of the words 'No Court shall... pass a decree, etc.,' in S. 7 of Act 7 of 1939 which replaced S. 11 of the old Act it was contended that the decision affected the powers of a Court and therefore the Federal Court was not bound to consider its effect :

Held that as the Federal Court was not in fact to pass any decree but had to declare the judgment which should be substituted for the previous judgment of the High Court it was entitled to take into account the provisions of S. 7 and declare what the new judgment of the High Court should be in accordance with Act 7 of 1939. [P 9 C 2]

(d) Government of India Act (1935), S. 205 (1) and (2)—Appellant wishing to take grounds in appeal other than constitutional one—Certificate under S. 205 (1) is not sufficient—He must obtain further certificate under O. 45, R. 3, Civil P. C.

Rules 1 to 14 of O. 45, Civil P. C., show that if an appellant also wishes to take some grounds other than the constitutional one, he must "state the grounds of appeal and pray for the certificate either that as regards the amount or value and nature, the case fulfils the requirements of S. 110, Civil P. C., or that it is otherwise a fit one for appeal to His Majesty in Council." In such a case the certificate granted by the High Court under S. 205 (1) of the Act is not sufficient, but the appellant must in addition obtain the further certificate required by O. 45, R. 3, Civil P. C. It follows that if an appellant wishes to take such other grounds in the appeal, he can raise them under S. 205 (2) (ii) only if the value is Rs. 10,000 and upwards and, where there is an affirmance of the first Court's decision, the appeal involves some substantial question of law, or the High Court certifies that the case is otherwise a fit one for appeal to the Federal Court. The whole of the procedure prescribed in O. 45, Civil P. C., including that for furnishing security for costs, would apply to the application praying for such a certificate, even though a certificate under S. 205 (1) of the Act has already been granted. Consequently, it would not be proper to allow an appellant to evade these provisions by simply obtaining a certificate under S. 205 (1) of the Act, and then asking for leave to raise all the other grounds by bringing them within the third category. This last category refers to "other" grounds, which must mean other than those mentioned in the first and second categories. [P 11 O 1, 2]

(e) Government of India Act (1935), S. 205 — Appeal to Federal Court from High Court's de-

cree—Matter appealed against becomes sub judice again — Federal Court has seisin of whole case except for certain purposes.

Once the decree of the High Court has been appealed against, the matter becomes sub judice again and thereafter the Federal Court has seisin of the whole case, though for certain purposes, e. g., execution, the decree is regarded as final and the Courts below retain jurisdiction. [P 13 C 1]

(f) *Bihar Money-lenders Act (7 of 1939), S. 7 — Construction — Hindu joint family — Out of sum actually advanced only smaller sum found for family necessity and therefore legally recoverable — Interest under S. 7 should not exceed amount actually advanced and not amount found legally recoverable.*

Under S. 7, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties. [P 14 C 2]

Consequently, where out of the amount actually advanced to a member of a joint Hindu family only a smaller sum is found to be for family necessity so as to make that sum alone recoverable from out of the joint family property of the borrower and his sons, the interest should not exceed the amount actually advanced under the valid contract between the lender and the borrower and not the sum which is found legally recoverable under Hindu law : A I R 1940 F C 7, *Disting.*

[P 14 C 1]

(g) *Hindu Law—Debts—Father — Antecedent debt — Mortgage by father to pay off earlier mortgage executed to satisfy debt under pronote — Debt under pronote is antecedent debt at date of earlier mortgage — Later mortgage to pay off earlier mortgage is valid — Onus to prove debt under pronote as being "avyavaharika" and its extent is on sons.*

A mortgage by father to pay off an earlier mortgage executed to satisfy a debt under a pronote incurred for expenses of litigation, payment of Government revenue and other family expenses is perfectly valid. The debt under the pronote must be treated as "antecedent debt" at the date of the earlier mortgage. The onus to prove that the debt under the pronote was "avyavaharika" and also its extent is on sons and grandsons desiring to escape liability for the debt. [P 15 C 2]

Dr. Narain Prasad Asthana, Advocate General of the United Provinces (with him Mr. Raghubir Singh, Advocate, Federal Court), instructed by Mr. T. K. Prasad, Agent —

for the Appellants.

Sir B. L. Mitter, Advocate General of India (with him Major Surendropal Singh, Advocate, Federal Court), instructed by Mr. B. Banerji, Agent —

for the Respondents.

Gwyer C. J. — In this case I find myself entirely in agreement with the judgment to be delivered by my brother Varadachariar, which I have had an opportunity of reading. I do not think it necessary therefore to deliver a judgment of my own; but, with regard to the question whether the Court is entitled to take into account legislative changes since the decision under appeal was given, I desire to point out that the rule adopted by the Supreme Court of the United

States is the same as that which I think commends itself to all three members of this Court. In (1934) 294 U S 600¹ at p. 607, Hughes C. J., said :

We have frequently held that in the exercise of our appellate jurisdiction we have power not only to correct error in the judgment under review but to make such disposition of the case as justice requires. And in determining what justice does require, the Court is bound to consider any change, either in fact or in law, which has supervened since the judgment was entered.

This view of its powers was re-affirmed by the Court in a case decided as recently as March last : (1940) 309 U S 551² at p. 555.

Sulaiman J. — The facts of the case are given in the judgment of my brother. I propose to consider separately a few points of law that have created difficulties. As would appear from the orders passed by the Federal Court in this case on 5th March 1940 (formerly case No. 14 of 1939, reported in 3 F L J 15,³ the High Court after granting a certificate under S. 205 (1) of the Act (Government of India Act, 1935), declined to extend the time for making the deposit, required by O. 45, R. 7, Civil P. C., (Civil Procedure Code, 1908), and therefore did not admit the appeal. The appellants were, however, excused by this Court from compliance with so much of O. 10, F. C. R. (Federal Court Rules) as required them to get the record prepared and printed in the High Court, and to lodge their petition of appeal within sixty days of the admission of the appeal by the High Court.

The Bihar Money-Lenders Act (3 of 1938) (read with Act 5 of 1938) was repealed and replaced by Act 7 of 1939, which came into force in May of that year. Although the High Court did not declare the appeal admitted, the appellants lodged their petition of appeal in December 1939, urging inter alia that S. 11 of the old Act was not void and that in any case S. 7 of the new Bihar Act was applicable. They also raised a number of other grounds relating to the merits of the case. The plaintiffs filed a cross-appeal, which they have withdrawn. Without re-arguing the point, Sir B. L. Mitter, the Advocate-General of India, has "formally" objected to the appeal.

Competency of the appeal — The difficulty to be considered arises out of R. 17,

1. (1934) 294 U S 600, *Patterson v. State of Alabama*.

2. (1940) 309 U S 551, *Minnesota v. National Tea Company*.

3. (1940) 27 AIR 1940 F C 26 : 187 I O 670 : I L R (1940) Kar F C 1 ; 3 F L J F C 15 (F C), *Lachmeshwar Prasad v. Girdhari Lal*.

which has been added to O. 45, Civil P. C., by the Adaptation Order [Government of India (Adaptation of Indian Laws) Order 1937]. The powers of the Judicial Committee are very wide, and the full and unqualified exercise of His Majesty's pleasure in receiving appeals to His Majesty in Council is expressly saved by S. 112 (1) (a), Civil P. C. The Federal Court has no power to entertain an appeal by giving a special leave. Section 205 of the Act specifies the case when an appeal would lie to this Court. Section 293 of the Act provides for adaptations and modifications of existing Indian laws by an Order in Council. The Adaptation Order has, with a few modifications, made O. 45, Civil P. C., applicable to Federal Court appeals.

As under S. 109, Civil P. C., the right to appeal to His Majesty in Council can be modified only by an Order in Council, such an order was issued on 17th April 1920, and deals with the procedure to be followed in the Indian High Courts, while the Judicial Committee Rules, dated 2nd May 1925, deal with the practice in the Privy Council, as saved by S. 112 (1) (b), Civil P. C. Under S. 214 (1) of the Act, the Federal Court has been given power to make rules for regulating generally "the practice and procedure of the Court," and even under S. 109, read with S. 111 (A), Civil P. C., it may, in cases to which that section relates, have power to make rules; but, so far, it has not made any express rules amending O. 45, Civil P. C. On the other hand, in deference to the Adaptation Order, assuming it to be *intra vires*, the Federal Court also has by its own O. 9, R. 1, made O. 45, Civil P. C., as modified and adapted, applicable to appeals to it. This O. 9, Federal Court Rules, governs the procedure when the matter is still before the High Court. Order 10, Federal Court Rules, which begins with the heading "Procedure after admission of appeal" deals really with the "practice and procedure" of the Federal Court. Rule 8 states that the petition of appeal is to be lodged in the Federal Court after "the admission of the appeal by the High Court appealed from."

One result of R. 17 having been added to O. 45, Civil P. C., by the Adaptation Order is that when the only ground of appeal stated in the petition is a constitutional one, even then like proceedings, except the security for costs, are to be had thereon as if a certificate under O. 45, R. 8 had been granted. The deposit of the amounts required to defray the expenses of translating, transcribing, indexing and transmitting a copy of the

record, and also of the amounts required to defray the expenses of printing such copy within the prescribed time, still remains necessary under R. 7. A necessary consequence is that under R. 8, the High Court, after the deposit has been made to its satisfaction, has to "declare the appeal admitted," and then "give notice thereof to the respondents," and to transmit the record to the Federal Court. The proceedings must be deemed to be pending in the Court, so long as there is a mere application for leave to appeal, even though the certificate required by S. 205 of the Act has been granted. But as soon as the required amounts have been deposited to the satisfaction of the Court, and the Court has declared the appeal "admitted," the matter becomes open to the Federal Court. Indeed, the record is transmitted only after such admission of the appeal.

Order 45, Civil P. C., itself shows the distinction between the two stages—before and after the admission of the appeal. Before the admission, the Court may revoke the security and make further directions thereon (R. 9). But after the admission, if the security appears inadequate or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, the Court may order the appellant to furnish further security, or make further payments (R. 10), but if he fails, it can only stay proceedings and await the order of the Federal Court. This obviously implies that after the admission of the appeal, it has passed out of the absolute control of the High Court. Rule 13 (1) also speaks of the grant of a certificate for the "admission" of an appeal.

This interpretation of O. 45, R. 8, Civil P. C., is borne in mind in the Order in Council, dated 17th April 1920, which maintains the same distinction between the two stages. Under R. 8, an appellant who has obtained the certificate may at any time "prior to the making of an order admitting the appeal" withdraw the appeal. Rule 9 also refers to a case where the appellant fails to apply with due diligence "for an order admitting the appeal." Rules 10, 11 and 12 relate to an appellant "whose appeal has been admitted." Rule 13 refers to a period between "the admission of the appeal" and the dispatch of the record, and in case of delay to "the appeal not being effectually prosecuted."

Similarly, the Judicial Committee Rules, 1925, maintain the same distinction. Rule 11 makes it incumbent on the appellant to take

steps for the transmission of the record "as soon as the appeal has been admitted," requires the High Court Registrar to certify to the Registrar of the Privy Council that the respondent has received notice or is aware of "the order of the Court appealed from admitting the appeal," and in case of failure, it is the Registrar of the Privy Council who calls for an explanation, and the appellant may have to show cause before the Privy Council. Under R. 29 the petition of appeal is to be lodged after the arrival of the record in England. Rule 30 requires that the petition of appeal should recite the principal steps in the proceedings "down to the admission of the appeal." Under R. 32, even if the appeal is desired to be withdrawn before the lodging of the petition of appeal, notice has to be given to the Registrar of the Privy Council and not direct to the Registrar of the High Court. Rule 43 also shows that the admission of the appeal is regarded as a crucial stage. As already pointed out O. 10, Federal Court Rules, also was intended to apply to the stage after the admission of the appeal and R. 3 requires the lodging of the petition of appeal after the "admission" of the appeal by the High Court.

It would therefore appear that the admission of the appeal by the High Court is its final judicial act, after which it must give notice of the appeal to the respondent. When the High Court has to be satisfied as to the sufficiency of the security, and that applies to all cases under O. 45, Civil P. C., I am unable to hold that the declaration that the appeal is admitted is a mere ministerial or administrative act, and not a judicial one. Barring cases, in which special leave may be granted by the Privy Council, it would be impossible for an appellant to go straight to the Privy Council, without his appeal having been admitted by the High Court. As there can be no question of any special leave for appeal being granted by the Federal Court, it would seem that so long as O. 45, R. 8, Civil P. C., remains applicable, an appellant cannot come to this Court without his appeal having been admitted by the High Court.

Under O. 37, R. 1 (which is based on R. 83 of the Judicial Committee Rules) we undoubtedly have full power to excuse compliance with any of the rules of the Federal Court, but this power is with reference to the rules made by the Federal Court itself, as indicated by the expression "these rules." Such a power cannot extend to excusing compliance with the rules of the Code of

Civil Procedure, in particular O. 45, which have been made applicable to Federal Court appeals, not only by our own O. 9, R. 1., but also by the Adaptation of Indian Laws Order. No doubt, under O. 37, R. 1, the Federal Court may give such directions in matters of practice and procedure as it shall consider just and expedient: but it is extremely doubtful whether such "directions" can be in supersession of O. 45, Civil P. C., in the absence of any rules amending it, so as to dispense with the necessity of the High Court directing the appeal to be admitted.

In the case before us, the Federal Court excused the appellants from complying with the requirements of O. 10, Rr. 1, 2 and 3, Federal Court Rules, which would mean condoning the delay caused by them, exempting them from getting the record printed and removing the time limit for lodging the appeal. But Rr. 1, 2 and 3 of O. 10 were intended to apply and do in fact apply to the stage after the appeal has been admitted, as is also apparent from the heading of that order. The effect of excusing the appellants from complying with these rules would not be to excuse them from complying with the rules of O. 45, Civil P. C., which contemplate the admission of the appeal by the High Court before the record is transmitted to this Court, and the petition of appeal is lodged here. In my order dated 5th March 1940, I had said:

There was no absolute necessity to make the whole of O. 45, Civil P. C., applicable to Federal Court appeals, even where the only ground taken were a constitutional one.

I would now go further and say, with the utmost respect, that it was a mistake to make the whole of O. 45 applicable to a case where a certificate under S. 205 (1) of the Act has been granted. Order 45 has not been made applicable to appeals which lie independently of S. 109, for instance an appeal by special leave to the Privy Council. In the same way it should not have been applied to a case where there is a statutory right of appeal under S. 205 of the Act. Cases where an appeal would lie by virtue of S. 109, Civil P. C., would be different, because that section itself confers such a right of appeal "subject to the provisions hereinafter contained", including O. 45. In such cases the right of appeal can be exercised only in accordance with the procedure prescribed in that order. It is most unfortunate that appellants, who have a statutory right to come up to the Federal Court under S. 205 of the Act, and quite indepen-

dently of s. 109 of the Code, should be hampered by the rules laid down in O. 45, Civil P. C., which had been meant for different classes of appeals altogether.

Applicability of the new Act—As regards our applying the Bihar Money-Lenders Act (7 of 1939), Sir B. L. Mitter, the Advocate-General of India, objects that we have no power to apply it at all. His contention is that the new Act affected the respondents' vested rights, obtained under the High Court's decree, and they should not be adversely affected. He has further urged that s. 7 applies only when the High Court is hearing an appeal or revision from an inferior Court. He sought to distinguish the Privy Council case in 63 I A 47=15 Pat 268⁴ relied on in the judgments delivered in 1939 F C R 193=2 F L J 5.⁵ His argument is that in the Privy Council case the new Act was retrospective, because, even as regards past transfers, it had provided that "every person claiming an interest as landlord.... shall be deemed to have given his consent, etc.". No doubt the Act had a retrospective action, but the absolute and irrebuttable presumption of consent would be drawn by Courts after the coming into force of the Act. Nevertheless, their Lordships took that Act into account, regarding the suit as still pending. In 1939 F C R 193,⁶ I had pointed out in my judgment that it was a converse case where a new Act, passed during the pendency of the Privy Council appeal, had taken away the appellant's rights, which he was proposing to enforce. It was also pointed out that in England where appeals are by way of "re-hearing", an appellate Court grants relief according to the new law which has come into force in the meantime, even though the judgment of the inferior Court had been correct according to the law as it then stood: (1882) 9 Q B D 672;⁶ see also (1912) A C 788⁷ where it was reaffirmed that

an appeal to the Court of appeal is by way of rehearing, and the Court may make such order as

4. ('86) 23 A I R 1936 P C 49 : 160 I C 105 : 15 Pat 268: 63 I A 47, K. O. Mukherjee v. Mt. Ram Ratan Kuer.

5. ('39) 26 A I R 1939 F C 74 : 182 I C 161 : I L R (1939) Kar F C 165: 1939 F O R 193: 2 F L J 5 (F C), Shyamakant Lal v. Rambhajan Singh.

6. (1882) 9 Q B D 672 : 52 L J Q B 44 : 47 L T 562 : 31 W R 75, Quilter v. Mapleson.

7. (1912) 1912 A C 788 : 82 L J Ch 45 : 107 L T 859: 11 L G R 194: 76 J P 481, Attorney-General v. Birmingham, Tame, and Rea District Drainage Board.

the Judge of the first instance could have made if the case had been heard by him at the date on which the appeal was heard.

It was in that view that I had preferred to base my judgment first on the ground that s. 16 of the old Bihar Money-Lenders Act, which had been impugned, was in fact not void, and that the High Court's view on that point was, in my opinion, not correct. Dr. Asthana, the Advocate-General of the United Provinces, on the other hand, has urged that we are bound to apply s. 7 of the new Bihar Act, which has replaced the old s. 11. The decree of the High Court is not yet final, as an appeal is pending before us. The adjudication of the rights of the parties as made by the High Court is not yet final. If we allow the appeal on any of the other grounds, we would be bound to remit the case to the High Court, in which event the High Court would be bound to comply with the provisions of s. 7 of the new Bihar Act. When the case goes back, the proceedings before the High Court would still be in appeal from an inferior Court, even though the case has been remitted by the Federal Court. Although the provision "no Court shall . . . pass a decree, etc." does affect the powers of a Court and so would not be binding on the Federal Court, this Court does not in fact pass any decree. As we would have to declare the judgment which should be substituted for the previous judgment of the High Court, we shall have to take into account the provisions of s. 7 and declare what the new judgment of the High Court should be in accordance with the Bihar Act in force. If, however, we dismiss the appeal such a contingency would not arise.

Appeals to the Federal Court are governed by ss. 205 and 209, Government of India Act. As I said in 1939 F C R 193⁶ on p. 204, we are not bound to apply the new Act; at the same time it is equally clear that we are not debarred from applying it. My Lord the Chief Justice and my brother held that the passing of the new Act had made it unnecessary to consider the validity of the old Act. Since then, this Court has consistently applied the new Bihar Act without going into the question whether the corresponding provisions of the old Act were void or not: 3 F L J 1⁸ at p. 6, 3 F L J 7⁹ at

8. ('40) 27 AIR 1940 F C 1 : 185 I C 1 : I L R (1940) Kar F C 45 : 3 F L J F C 1 (F C), Ramnandan Prasad v. Madhawanand Ramji.

9. ('40) 27 AIR 1940 F C 3 : 185 I C 294 : 3 F L J F C 7 (F C), Jagdish Jha v. Aman Khan.

p. 8, 3 F L J 27,¹⁰ 3 F L J 46,¹¹ 3 F L J 55¹² and 3 F L J 58.¹³ In the last mentioned case the Advocate-General of India had appeared for the respondents. The present case is now the very last case of this kind in which such a question can arise. Unless a manifest error of law was made, it would not now be proper to depart from the practice so far adopted.

Interpretation of Section 7 of the Bihar Act—It has been urged on behalf of the appellants that under S. 7 of the new Bihar Act, the decree for interest should not exceed the amount of the loan advanced, and that the amount of the loan advanced should be taken to be that amount which has been found to have been for legal necessity. Reliance has been placed by the learned counsel for them on the case in 3 F L J 55.¹² But in that case the mortgage deed had been executed by two persons, Birendra and Debindra, part of the mortgage money having gone into the pocket of Debindra alone. The plaintiffs released Debindra and his sons from all liability and sued to enforce the mortgage against the half share of Birendra and his sons. They had claimed only one-sixth share of the total amount, because the plaintiffs had inherited only two-sixth share in the mortgage deed, the rest having gone to the defendants. The integrity of the mortgage had been broken, and the plaintiffs had discharged one of the mortgagors, and splitting up the liability, were suing the other for his share only. It was not even known how much interest had already been realized from the exempted mortgagor Debindra. It was in these circumstances that the liability of the contesting defendants was considered separately, and it was remarked at p. 57:

It could not have been the intention of the Legislature that if there are several executant who have borrowed various sums and the creditors sues one of them for his separate share only, having already realized the balance from the others, then the maximum prescribed for the amount of interest to be decreed against him is not to exceed the aggregate of the various sums borrowed by him as well as all the other pro forma defendants, who are not really being sued.

That ruling cannot apply to the present

10. ('40) 27 AIR 1940 F C 10: 187 I C 612: I L R (1940) Kar F C 14: 3 F L J F C 27 (FC), Surendra Prasad v. Gajdhar Prasad.

11. ('40) 27 AIR 1940 F C 20: 187 I C 796: I L R 1940 Kar F C 33: 3 F L J F C 46 (FC), Jai Gobind Singh v. Lachmi Narain Ram.

12. ('40) 27 AIR 1940 F C 19: 187 I C 622: I L R (1940) Kar F C 42: 3 F L J F C 55 (FC), Birendra Prasad v. Surendra Prasad.

13. ('40) 27 AIR 1940 F C 7: 187 I C 436: 3 F L J F C 58 (FC), Subhanand v. Apurba Krishna.

case, where the defendants, namely the mortgagor, his sons and grandsons, are sued as representing one family, and there is one debt for which the claim is brought. There is no question of distinct and separate interests of the various defendants. The amount had been advanced to the father alone but is effective for creating a charge against the whole family in respect of a part of the amount only. In such a case the words "the amount of the loan advanced" or "the amount of the loan mentioned in such document" must obviously mean the whole amount which passed, as that was the loan. The fact that a part of it is not effective to create a charge on the family property is a different matter. Dr. Asthana has abandoned all the other grounds except the last one relating to Rs. 4805. He has argued that he is entitled to urge this ground under S. 205 (2) of the Act, and in the alternative has asked for leave to urge it. But again as I pointed out to him there is a difficulty in his way.

Necessity of a further certificate—Section 205 (1), Government of India Act, gives jurisdiction to this Court to hear appeals, if the High Court certifies that the case involves a constitutional question. No appeal lies at all, if no such certificate is given. Under sub-s. (2) where such certificate is given, any party may appeal to the Federal Court,

(i) on the ground that any such question has been wrongly decided, and

(ii) on any ground on which that party could have appealed without special leave to His Majesty in Council, if no such certificate had been given, and

(iii) with the leave of the Federal Court on any other ground.

In such an event no direct appeal lies to His Majesty in Council either with or without special leave. The word "ground" has been used at three places in sub-s. (2). According to the ordinary rule of interpretation, each ought to have, as far as possible, the same meaning at all the three places in the same sub-section. Now the word "ground" in the first category obviously means ground of objection or point in the appeal. The word "ground" in the third category also obviously has the same meaning, that is to say, ground of objection or point. It follows that ordinarily the interpretation of the word "ground" in the second category should be the same so as to mean a ground of objection. This would make the second category read as 'on any ground of objection on which that party could have appealed to His Majesty in Council'. In the

Code of Civil Procedure, there is a clear distinction between a case in which there is a right of appeal and the grounds which can be taken when an appeal lies. Sections 109 to 111, Civil P. C., deal with the cases in which appeals "lie" to His Majesty in Council, and not with the grounds which can be taken when an appeal has lain. On the other hand, O. 45, R. 3, Civil P. C., refers to the "grounds" of appeal which must be stated in the petition for leave to appeal to His Majesty in Council. If the word "ground" in the second category were to mean ground of objection, then that would entitle an appellant, once an appeal has come to the Federal Court on account of the certificate on a constitutional question, to raise all grounds of objection which he could have raised in an ordinary appeal to His Majesty in Council. He would be entitled to urge these as of right without being hampered by the provisions of O. 45, Civil P. C.

On the other hand, it is probable that the intention of Parliament was to allow an appeal on a certificate as to the constitutional question, and then to allow an appeal on other points, only in those "cases" in which an appeal would lie to His Majesty in Council. If this was the intention of Parliament, then the word "ground" has been somewhat unhappily used and the words "on any ground on which" should be treated as being equivalent to "in any case in which". There is no doubt, however, that the Adaptation of Indian Laws Order (1937) has accepted this second interpretation of the word "ground" in the second category. Sections 109, 110 and 111, Civil P. C., (with S. 111A added) have been adapted and made expressly applicable to Federal Court appeals. Even O. 45, Civil P. C., with a few modifications, has been made applicable to them. Rule 17, which has been added to O. 45, makes the provisions of the order, which are ordinarily applicable to the case of a certificate under S. 110, Civil P. C., apply even to the case where the only ground taken is a constitutional one.

Now an examination of Rules 1 to 14 of O. 45 of the Code shows that if an appellant also wishes to take some grounds other than the constitutional one, he must "state the grounds of appeal and pray for the certificate either that as regards the amount or value and nature, the case fulfils the requirements of S. 110, or that it is otherwise a fit one for appeal to His Majesty in Council" (O. 45, R. 8). The necessary result is that in such a case the certificate granted by the

High Court under S. 205 (1) of the Act will not be sufficient, but the appellant must in addition obtain the further certificate required by R. 3. It follows that if an appellant wishes to take such other grounds in the appeal, he can raise them under the second category only if the value is Rs. 10,000 and upwards and, where there is an affirmation of the first Court's decision, the appeal involves some substantial question of law, or the High Court certifies that the case is otherwise a fit one for appeal to the Federal Court. The whole of the procedure prescribed in O. 45, Civil P. C., including that for furnishing security for costs, would apply to the application praying for such a certificate, even though a certificate under S. 205 (1) of the Act has already been granted. In this view, it would not be proper to allow an appellant to evade these provisions by simply obtaining a certificate under S. 205 (1) of the Act, and then asking for leave to raise all the other grounds by bringing them within the third category. This last category refers to "other" grounds, which must mean other than those mentioned in the first and second categories. In view of the cumulative sense of the conjunction 'and' which has been used instead of 'or' in the alternative sense, the position of the respondent who files a cross-appeal direct, in the Federal Court is still more difficult. It is however not absolutely necessary to settle the interpretation of the word "ground" finally, because I agree with my brother that on the merits the defendants' plea must fail even if we hear it. I concur in the order proposed.

Varadachariar J.—The present case is one of a number which have lately come before this Court from Patna and in which questions have been raised under the Money-Lenders Acts passed in Bihar in 1938 and 1939. In a mortgagee's suit for recovery of money by sale of the mortgaged property, the principal defendants (defendants 1 to 6 raised contentions questioning the validity and binding character of the mortgages sued on and also sought to have the rate of interest reduced. The suit comprised claims on two mortgage bonds, one dated 12th December 1918, for Rs. 45,000, and the other dated 17th October 1919, for Rs. 15,000, which had been executed by defendant 1 for himself and as guardian of his sons, defendants 2 and 3, who were then minors. The amounts had been borrowed partly to discharge antecedent debts and partly to meet future expenses; and the bonds whereby the joint

family property was given as security provided for payment of compound interest at 12 per cent. per annum with annual rests. Defendants 4 to 6 are the minor sons of defendant 2.

The trial Court found that the bonds were supported by consideration to the full extent stated; but as it held that portions of the debts had not been borrowed or used for purposes binding on the joint family, it passed a mortgage decree for Rs. 27,287-4-0 only on the first bond and Rs. 5000 on the second. The Court held that the stipulated interest was not "hard, unconscionable or penal", and accordingly awarded to the plaintiffs compound interest at 12 per cent. per annum with annual rests. There was an appeal and cross-appeal to the High Court, which increased the principal amount recoverable under the first bond by Rs. 7305-11-6 and made a slight reduction in the sum due under the second bond. The claim for compound interest was disallowed, and simple interest only awarded at 12 per cent. per annum up to the date fixed for payment in the decree of the trial Court. The Court declined to award interest on a sum of Rs. 2000 out of the sum due under the first bond.

Among the contentions raised on behalf of the defendants before the High Court, there was one based on S. 11, Bihar Money-Lenders Act (3 of 1938) which had been enacted during the pendency of the appeal. The High Court held that section to be void under S. 107, Constitution Act, and granted a certificate under S. 205 (1) of the Act. Defendant 1 died during the pendency of the suit and the present appeal has been preferred by defendants 2 to 6. The plaintiffs filed some cross-objections, but withdrew them before the appeal came on for hearing. It only remains to add that soon after the decision of the High Court in the present case, the Bihar Legislature repealed the Money-Lenders Act of 1938 and substantially re-enacted it as Act No. 7 of 1939, taking certain precautions which were required to obviate the objections to the validity of the earlier Act.

In view of the earlier decisions of this Court in similar cases, counsel for the appellants rightly assumed that his clients would be held entitled to the benefit of S. 7 of the new Act of 1939, though it had been enacted only after the date of the decision of the High Court in this case; and, on that assumption, he raised a contention as to the manner in which the maximum amount of interest

for which his clients could be held liable should be fixed in the particular circumstances of the case. Counsel for the respondents recognized that the decisions of this Court entitled the appellants to claim the benefit of the Act of 1939, but he was permitted to re-argue the question as he suggested that certain relevant considerations had not been urged or dealt with on previous occasions. It, however, seems to me that the considerations now urged by him have in substance been taken into account in the earlier cases, though the language employed might not have stated them in the particular form in which he now put them.

The respondents' argument was founded on the theory that when hearing an appeal this Court was only concerned to see whether or not the judgment of the High Court was in conformity with the law as it stood at the time that that judgment was given; and it was contended that as the Act of 1939 had not been enacted at the time when the High Court decided the present case, this Court was not competent to give relief to the appellants in terms of S. 7 of the new Act. Counsel for the respondents laid stress upon the language of S. 7 of the Act of 1939, the words being "no Court shall . . . pass a decree, etc.," though he recognized that the section has in terms been made applicable to appeals in suits brought before the commencement of the Act and that the decree in appeal yet remained to be passed in this Court; but he insisted that the pendency of the appeal in this Court was of no consequence and that the material date was the date of the High Court's decree, because an Act passed by the Bihar Legislature could not directly operate to take away the powers of this Court. This line of argument seems to rest on more than one erroneous assumption.

The question whether S. 7 of the Act of 1939 is or is not one of which even this Court is bound to take notice is not free from difficulty. Under the Constitution Act, a Provincial Legislature is precluded from dealing with the jurisdiction and powers of the Federal Court, but in deciding a question of this kind, one must look at the substance of the impugned provision and not merely at its form. If S. 7 of the Act of 1939 is to be regarded as a provision regulating the substantive rights of parties, by fixing the maximum amount of interest which a creditor is entitled to claim from his debtor up to the date of the institution of the suit, can it be described as one dealing with "the

jurisdiction or powers" of the Court merely because it takes the form of a direction to the Court? The section might equally well have enacted that no money-lender shall be entitled to recover more than a certain sum by way of interest, and it would then be difficult to say that it was legislation which interfered with the jurisdiction or powers of this Court. Is the provision to be held to be valid or invalid according as it is couched in one form or in the other when the substantial effect of both forms is the same?

It does not however seem to be necessary for the purpose of this case to express a final opinion on the question just discussed, because, even assuming that this Court is not directly bound by the provisions of the Bihar Act, the appellants will still be entitled to claim that this Court is bound to pronounce the judgment which the High Court would have pronounced, if it were hearing the appeal at this moment. There can be no doubt that if the High Court at Patna had now to deal with this case, it would have to govern itself by the provisions of S. 7 of the Act of 1939. Sir Brojendra Mitter argued that before the passing of the Act of 1939, the decree of the High Court in the present case had become final, and that the High Court would under S. 209, Constitution Act, have to deal with the present case again only if this Court allowed the appeal, but that there was no justification for this Court allowing the appeal, unless it could say that the decision of the High Court was incorrect even according to the law as it stood at the time when the decision was given. I am unable to agree that that is the correct position.

Once the decree of the High Court had been appealed against, the matter became sub judice again and thereafter this Court had seisin of the whole case, though for certain purposes, *e.g.*, execution, the decree was regarded as final and the Courts below retained jurisdiction. In 3 F L J 58¹³ this Court has held that the mere fact that the particular statute in respect of which the constitutional question was originally raised had been since repealed will not put an end to the appeal; and, except on the hypothesis that this Court is only a Court of error, its power to do justice between the parties cannot be restricted to cases in which it is able to hold that the lower Court has gone wrong in its law. The contention that the power of a Court of appeal is so limited was distinctly negatived in (1912) A C 788⁷ and

(1892) 9 Q B D 672⁶ which are referred to in the judgment in 1939 F C R 193.⁵ As stated in 1939 F C R 193⁶ there is no reason to suppose that the powers of this Court when acting as a Court of appeal are less extensive than those of the High Courts when hearing an appeal; and it has been a principle of legislation in British India at least from 1861 that a Court of appeal shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Civil Procedure Code on Courts of original jurisdiction: see Act No. 23 of 1861, S. 37; Act No. 10 of 1877, S. 582; Act No. 14 of 1882, S. 582; and Act No. 5 of 1908, S. 107 (2). The very words of O. 58, R. 5 of the Rules of the Supreme Court, on which Bowen L. J. laid stress in (1892) 9 Q B D 672⁶ at p. 678 and Lord Gorell in (1912) A C 788⁷ at p. 801, namely that the Court of appeal has power to make such further or other order as the case may require, have been reproduced in O. 41, R. 38, Civil Procedure Code of 1908; and even before the enactment of that Code, the position was explained by Bhashyam Iyengar J., in 26 Mad 91¹⁴ at pp. 95, 96 in language which makes it clear that the hearing of an appeal is under the processual law of this country in the nature of a re-hearing. The Indian Codes have from 1859 conferred upon a Court of appeal the power given by O. 58, R. 4, Supreme Court Rules to allow further evidence to be adduced; and though the English rule does not in terms impose the same limitations on this power as the Indian Codes do, these limitations are implied in the reference to "special grounds" in the English rule and have in effect been insisted on even in England as a matter of practice: see (1917) 1 K B 384.¹⁵ In view of these provisions, it seems to me to make no difference that it is not explicitly stated in the Indian statutes (as in O. 58, Supreme Court Rules that an appeal is by way of re-hearing. It is also on the theory of an appeal being in the nature of a re-hearing that the Courts in this country have in numerous cases recognized that in moulding the relief to be granted in a case on appeal, the Court of appeal is entitled to take into account even facts and events which have come into existence after the decree appealed against. I may also refer to 86 Mad 489¹⁶ at pp. 441-

14. ('02) 26 Mad 91 (F B), *Kristnama Chariat v. Mangammal*.

15. (1917) 1 K B 384; 86 L J K B 370; 116 L T 129; 81 J P 57; 15 L G R 109, *Nash v. Rochford*.

16. ('10) 86 Mad 489; 8 I C 736; (1910) 1 M W N 841; 9 M L T 64; 21 M L J 31, *Kanakayya v. Janardhana Padhi*.

444 where the law on the point is fully discussed.

The practice of the Judicial Committee in this respect does not appear to have been uniform. In 905 A C 383¹⁷ Lord Davey, delivering the judgment of the Board, observed that :

Their Lordships have only to say whether that judgment (the judgment of the Supreme Court of Ceylon) was right when it was given.

After referring to (1882) 9 Q B D 672,⁶ his Lordship added at p. 390 :

Without limiting the extent of His Majesty's prerogative their Lordships can safely say that it is not the practice of this Board to entertain any other appeal than one strictly so called, in which the question is whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it.

In the recent case of *Mukherjee v. Ram Ratan* it would appear from the report of the arguments in 63 I A 47³ that (1882) 9 Q B D 672⁶ was referred to, and it was observed by Lord Thankerton in the course of the argument that the duty of a Court is to administer the law of the land at the date when the Court is administering it. This adds significance to the fact that their Lordships in that case did not deal with the judgment of the Patna High Court on its merits, but dismissed the appeal on the strength of a provision contained in an enactment which was passed only during the pendency of the appeal before His Majesty in Council. In these circumstances I am of opinion that we should follow the law as laid down in the latter case.

If this Court is entitled to act as a Court of appeal in the sense above explained, Sir Brojendra Mitter did not, in view of the decisions in (1882) 9 Q B D 672⁶ and (1912) A C 788⁷ contend that the appellants were not entitled to claim the benefit of S. 7 of the Act of 1939. It is therefore unnecessary to consider the contention which he raised as to the precise character in which the High Court acts when it passes a decree in terms of a declaration made by this Court under S. 209, Constitution Act.

Counsel for the appellants argued that in determining the extent of their liability for interest under S. 7 of the Act, the maximum payable up to the date of the institution of the suit must be held to be only the sums of Rs. 34,492-11-6 and Rs. 4949-8-0, that is, the sums which have been held to be the debts binding on the joint family out of the sums borrowed under the mortgage bonds. This contention is in my opinion untenable.

17. (1905) 1905 A C 383 : 74 L J P C 102 : 92 L T 740 : 21 T L R 524, *Ponnamma v. Arumogam*.

Section 7 of the Act mentions three limits: (1) the amount of loan advanced, (2) the amount of loan mentioned in the document and (3) the amount of loan evidenced by such document. It is not necessary for the purpose of this case to consider what is to happen when the amounts calculated on these several cases differ; for it has been found in this case that in respect of both the bonds, the full amounts specified therein, viz., Rs. 45,000 and Rs. 15,000, had in fact been advanced or were otherwise due. It is again unnecessary to consider the situation which might arise if it should be found that part of a loan had been advanced for "illegal" or "immoral" purposes in the sense in which those expressions are used in the general law of contracts. The finding in the present case that out of the sums due under the bonds only Rs. 34,492-11-6 and Rs. 4949-8-0 respectively were binding on the joint family does not imply that as between the lender and the borrower there was not a valid contract of loan under which the whole amount could have been recovered from the borrower by having recourse to his separate properties, and, if only effective steps had been taken during his lifetime, even from his share in the joint family property. The appellants are no doubt entitled to rely on the rules of the Hindu law and to limit their liability to the binding portion of the debt; but on that portion interest will be calculated in accordance with the terms of the contract, except where the Court finds reason to reduce the contract rate. If and so far as the appellants claim the benefit of S. 7 of the Act of 1939, the limitation on the amount of interest can only be imposed in terms of the section and not by reading into it any rule derived from the personal law of the parties.

Dr. Asthana suggested that his contention received some support from the decision of this Court in 3 F L J 55;¹² but the facts of that case were quite different. Though, the mortgage bond executed by defendants 1 and 4 in that case purported to be for a sum of Rs. 1,00,000, it was found that consideration must have passed to the two brothers jointly only to the extent of Rupees 75,000, the balance of Rs. 25,000 having gone, if at all, to the exclusive benefit of defendant 4. The plaintiffs settled their claim against defendant 4 and sued defendant 1 and his sons for recovery of a sixth share of the debt which they alleged was due from them. There was in the judgments of

the Courts below some reference to family benefit, but that was apparently in connexion with a plea of defendant 1 that he had been duped into joining in the execution of the mortgage bond without receiving any benefit thereunder. The question of "family benefit" under the Hindu law rules relating to joint family transactions did not arise in the case, since defendant 1 was a party to the document, and it was found that his sons had not been born at the date of the suit transaction. On these findings, this Court held that as the plaintiffs had themselves split up the liability of the parties, the case must be dealt with as one in which the loan due to the plaintiffs from defendant 1 and his sons was only Rs. 12,500, *i. e.*, one-sixth of Rs. 75,000. The decision did not purport to deal with a case where out of the amount found to have been advanced to the particular debtor only a smaller sum was held to have been required for family necessity, so as to make that sum alone recoverable from out of the joint family property of the borrower and his sons.

Out of the items of principal allowed by the High Court in plaintiffs' favour, on their memorandum of objections, exception was taken by the appellants here to the allowance of the sum of Rs. 4805-11-6, a portion of the consideration of the first mortgage bond. They alleged that that sum was utilized for the satisfaction of an earlier mortgage for Rs. 6000, and that a portion of the consideration of this earlier bond was in its turn utilized for the satisfaction of a debt due to the plaintiffs under three hand-notes executed by defendant 1. The trial Court had disallowed this item on the ground that the moneys borrowed had been taken by defendant 1 for the purposes of an unnecessary and improper litigation, and that the debt was to that extent an "avyavaharika" debt for which the family property could not be held liable. The High Court reversed this finding, on the ground that the onus was on the defendants to prove how much of the moneys borrowed under these documents had been used for that litigation and that they had adduced no satisfactory reasons. Dr. Asthana contended that in coming to this conclusion the High Court had overlooked an admission made by plaintiff 3 in the witness box to the following effect :

It has been correctly put down in the bond for Rs. 6000 that the three hand-notes mentioned in it were for the expenses of the case.

This general statement carries the case no further than the recitals in the bond for

Rs. 6000, because the witness only affirmed the correctness of those recitals, and as pointed out in the judgment of the High Court, the bond recites not only the expenses of the litigation, but also payment of Government revenue and other family expenses as purposes for which moneys were borrowed under the three hand-notes. These debts must be treated as "antecedent debts" at the date of the mortgage for Rs. 6000, and a fortiori so on the date of the mortgage for Rs. 45,000, and a mortgage of the family property to secure their repayment was *prima facie* valid. If the sons and grandsons desired to escape liability for these debts, the onus lay upon them to prove that they were "avyavaharika" debts.

On the conclusions above stated, no interference with the decree of the High Court will be necessary so far as the claim under the second mortgage bond is concerned, because the interest calculated in accordance with the decree of the High Court on the sum of Rs. 4949-8-0 for which alone the appellants have been held liable under this bond will not at the date of the institution of the suit exceed Rs. 15,000, the amount mentioned in the bond. As regards the first mortgage bond, the amount recoverable by the plaintiffs must be calculated on the footing that only a sum of Rs. 45,000 was due for interest on 16th April 1932, the date of the plaint. The appeal is to this extent allowed and the case will be remitted to the High Court with a direction to pass a revised decree on the above basis.

It remains to advert to two points of procedural law arising out of certain defects in the steps taken by the appellants to bring the appeal before this Court. The first relates to the need for a separate certificate under O. 45, R. 3, Civil P. C., before a party can raise before this Court any question besides the one covered by the certificate under S. 205 (1), Constitution Act. As the appellant have failed on the merits in respect of the question of fact sought to be raised by them, it is unnecessary to express any opinion in this case on this point of procedural law. The other question relates to the effect of the absence of an order by the High Court (under O. 45, R. 8, Civil P. C.) declaring the appeal admitted. My learned brother has discussed this point at some length; but as no arguments bearing on this question were advanced at the Bar, I shall content myself with a few observations.

Though the scheme of O. 45 implies that, till the High Court makes the order under

R. 8, it still retains a measure of control over the proceedings, it does not appear to me that such an order is a condition precedent to the exercise of jurisdiction by this Court. The collocation of para. (a) of R. 8 of O. 45 with paras. (b), (c) and (d), which relate to notice to the respondents, transmission of the records and the delivery of a copy of the records to the respondents, is not without significance; and it certainly cannot be said that the steps contemplated by paras. (b), (c) and (d) of the rule are so vital as to affect the jurisdiction of this Court. In the present case, the High Court has, since the order of this Court on 5th March 1939 enabled the appellants to have the records printed at Patna and have transmitted them to this Court; and presumably copies have been given to the other side in due course. The requirements of paras. (c) and (d) of R. 8 have thus been complied with, and there seems to be no obstacle in the way of this Court in disposing of the appeal in due course.

It may be a difficult question on the rules as they stand what the position would be if security for costs was not given by the appellants in a case where such security is necessary under the rules. It is certainly doubtful if this Court has power to dispense with the giving of security in such a case. But the rules as to payment of printing deposit, transmission charges, etc., stand on a different footing, and if this Court has, as it has already held, power to dispense with or give special directions as to printing and production of the records before this Court, it would be illogical to insist that the High Court must pass an order under para. (a) of R. 8 of O. 45 which can be passed only on compliance with the directions originally given by the High Court, which ex hypothesi have become inoperative because of this Court's directions in the matter. This Court was careful only to excuse the appellants from the operation of the rule of this Court which fixes 60 days from the date of the admission of the appeal by the High Court as the period during which the appellants should lodge their petition of appeal in this Court and gave them liberty to furnish copies of the record to this Court on their own responsibility. The Court then observed that these particular provisions in O. 45 were only procedural provisions and that it was not necessary to hold that non-compliance with them in the High Court ousted the jurisdiction of this Court when a certificate under S. 205 (1), Constitution Act, had once been given. I see no reason now to think other-

wise and I am of opinion that as between the parties to these proceedings, the view already expressed by the Court is binding. As the appellants have only partly succeeded in their appeal with regard to the interest and have failed in their appeal with regard to the principal, there need be no order as to costs in this Courts.

G.N./R.K.

Order accordingly.

** A. I. R. 1941 Federal Court 16

(From Allahabad: AIR 1940

All 272 (F B))

GWYER C. J., SULAIMAN AND
VARADACHARIAR JJ.

United Provinces

v.

Mt. Atiqa Begum and others

Case No. 5 of 1940, Decided on 6th December 1940.

* (a) *Government of India Act (1935), S. 176 — Proprietary rights of Province not affected — Advocate-General should represent executive Government — Province should not be made party — (Per Gwyer C. J.)*

Where the validity or constitutionality of provincial legislation is in issue, and not any matter relating to the proprietary rights or interests of the Province, it is more convenient and more correct that the Advocate-General should represent the executive Government for the time being of the Province. This is the Dominion practice, and it ought to be followed in India. The operation of S. 176 (1) should be confined to cases in which the proprietary rights or interests of the Provinces are affected, and, if the Government of a Province desires to uphold the validity of a Provincial Act or to challenge that of a Federal Act, it should direct the Advocate-General of the Province to intervene on its behalf. [P 20 C 2, P 21 C 1]

* (b) *Civil P. C. (1908), O. 1, R. 10 — Suit involving question of validity of statute affecting scope of executive authority of Province — Advocate-General is proper party.*

Where in a suit the question whether a statute is or is not valid involves the question of the scope of the executive authority of the Province, the Advocate-General of the Province is a proper party, in the sense that without him the Court cannot effectually and completely adjudicate upon and settle all the questions involved in the suit; to allow the Advocate-General to intervene as a party in such cases is within the spirit and also the letter of the rule. [P 22 C 1, 2]

In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all, as a proper decree can certainly be passed in their absence. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public, and the Provincial Government would be indirectly interested in such an adjudication. Besides the effect of the High Court's ruling would be to nullify certain orders, previously issued by the Government, the enforceability of which was indirectly attempted by the impugned Act. The Government would be further interested and should be joined as a party. [P 28 C 1]

* (c) *Government of India Act (1935), S. 292*—S. 292 does not prohibit Indian Legislatures to pass retrospective legislation.

Within their own sphere the powers of the Indian Legislatures are as large and ample as those of Parliament itself, and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. There is nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them (Indian Legislatures) subject to that prohibition, nor, so far as that may be relevant, any explanation why Parliament should have desired to do so.

[P 24 C 2]

(d) *Government of India Act (1935), Sch. 7, Lists II and III*—No item to be read in restricted sense.

None of the items in the Lists is to be read in a narrow or restricted sense. Each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it.

[P 25 C 2]

* (e) *Government of India Act (1935), Sch. 7, List II, items 2 and 21*—"Collection of rents" includes remission of rents also.

The general descriptive words in item 21 include "the collection of rents;" and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Entries Nos. 2 and 21 read together cover any restriction that may be imposed on the jurisdiction and powers of Courts, with respect to land, land tenures, relation of landlord and tenant, and collection of rents.

[P 25 C 2; P 32 C 2]

(f) *Government of India Act (1935), S. 104*—Powers to legislate on particular subject includes powers to legislate for validating executive orders in respect of that subject (Per Gwyer C. J.)

Legislation for the purpose of "validation of executive orders" must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued. The remission of rent is a matter covered by item 21. The impugned Act is an Act with respect to the remission of rent, and it was within the competence of the United Provinces Legislature to enact it.

[P 26 C 1]

(g) *Civil P. C. (1908), O. 1, R. 10*—Necessary party and proper party explained (Per Sulaiman J.).

A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication.

[P 28 C 1]

(h) *Civil P. C. (1908), S. 151 and O. 41, R. 20*—R. 20 is not exhaustive—Inherent powers can be exercised (Per Sulaiman J.).

The language of R. 20 does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by S. 151: AIR 1984 All 4, Rel. on; AIR 1925 All 768, Expl.; 27 All 57, Disting. [P 28 C 2]

* (i) *Government of India Act (1935), S. 205*—High Court making Provincial Government party to appeal with idea that that would give them right to appeal to Federal Court on constitutional

question—Government being party to appeal have right to appeal to Federal Court (Per Sulaiman and Varadachariar JJ., Gwyer C. J., Dissenting.)

(Per Sulaiman and Varadachariar JJ.)—Where the High Court has by an express order brought the U. P. Government on the record and then made them a party to the appeal, with the idea that that would give to the U. P. Government a right to appeal to the Federal Court, it cannot subsequently be said that the U. P. Government were not "any party" in the appeal. S. 205 does not say any party "directly aggrieved by the judgment, decree or the final order" much less "directly aggrieved by the decree actually passed." In the absence of any such restriction in S. 205 and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, the U. P. Government who were a party to the appeal in the High Court have a right of appeal.

[P 29 C 1, 2]

(Per Gwyer C. J.)—The Province not being interested in any way in the original dispute between the plaintiffs and the defendants save to uphold the validity of a particular law which had been challenged in the course of the proceedings, the Federal Court would not, at the instance of a third party who had no direct interest in the original suit, order the High Court to vary the decree which it has given as between plaintiffs and defendants and the Province would not have a right of appeal.

[P 26 C 2; P 27 C 1]

(j) *Interpretation of Statutes*—Two interpretations possible—One less likely to produce impracticable results must be accepted (Per Sulaiman J.)

If there are two possible interpretations, it is the duty of a Court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results.

[P 31 C 2]

(k) *Interpretation of Statutes—Repeal*—It can be express or implied—When repeal is implied explained (Per Sulaiman J.)

It is not absolutely necessary that a statute must be repealed by express language, e. g., shown as repealed in an attached schedule. Repeal, and certainly alteration or amendment, can be effected by necessary implication also. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to have been impliedly repealed or amended, as the last expression of the will of the Legislature must always prevail. But they must really be irreconcilable with each other. Two negative enactments need not however be contradictory. An earlier statute expressed in negative language may be included in or absorbed by a later statute expressed in a similar negative language, but with a wider scope. The former in such a case would not be repealed, nor even necessarily altered by the latter, as they both can stand together, but it can be said to have been amended.

[P 31 C 2; P 32 C 1]

(l) *Government of India Act (1935), Sch. 7—Lists—Interpretation*—Court must consider Act as a whole.

When the question is whether any impugned Act is within any of the three Lists, or in none at all, it is the duty of Courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation.

[P 35 C 2]

(m) *Interpretation of Statutes — Retrospective effect—Statutes affecting vested rights.*

Statutes affecting vested rights must be construed strictly and not given a liberal interpretation : *Case law referred.* [P 37 C 2]

Whether the impugned Act is applicable to pending actions : (*Quære*). [P 39 C 1 ; P 47 C 1]

“(n) *Government of India Act (1935), S. 292 —U. P. Regularization of Remissions Act (14 of 1938), is not ultra vires U. P. Legislature and not opposed to S. 292 : ILR (1940) All 455 : AIR 1940 All 272 : 188 I C 586 (F B), REVERSED.*

The U. P. Regularization of Remissions Act of 1938 is within the sphere allotted to the Provincial Legislature by the Constitution Act; it is not opposed to S. 292 of that Act and is intra vires the United Provinces Legislature : ILR (1940) All 455 : AIR 1940 All 272 : 188 I C 586 (F B), *REVERSED.* [P 46 C 1]

Dr. Narain Prasad Asthana, Advocate-General of the United Provinces (with him Mr. Sri Narain Sahai, Advocate, Federal Court,) instructed by Mr. G. Sahay, Agent —

for Appellant.

Mr. P. L. Banerji, Senior Advocate, Federal Court (with him Mr. Prem Mohanlal Verma, Advocate, Federal Court) instructed by Mr. T. K. Prasad, Agent — for Respondents.

Gwyer C. J. — In this case the principal question to be decided is whether the Regularization of Remissions Act, 1938 (14 of 1938), an Act of the Legislature of the United Provinces, was within the competence of the Legislature which enacted it. The litigation in which the question has arisen can be briefly described. The defendants to the original suit were thekadars, a thekadar being, by statutory definition, “a farmer or other lessee of proprietary rights in land, and in particular of the right to receive rents or profits”, with the terms of his lease or theka embodied in a written instrument executed by the landlord. They were sued by their lessors for arrears of rent for the year ending June 1931, and the two following years at the rate reserved by the lease, and among other defences pleaded that remissions of rent had been ordered by the Local Government which ought to be taken into account in calculating the amount due. The plaintiffs contended that these remissions were beyond the power of the Government to order and that the defendants were not therefore entitled to rely upon them. On this issue both the trial Judge and the District Judge on appeal decided in the defendants’ favour. The plaintiffs then appealed to the High Court, and during the pendency of the appeal a Division Bench of the High Court held in another case, I L R (1938) ALL 114,¹ that remissions made in pursuance of the Govern-

ment order above referred to had no legal effect. In order to appreciate the legal questions involved, it is necessary to refer to certain statutory provisions contained in the Agra Tenancy Act, 1926, which at all material times regulated the relations between the parties, though it has since been repealed and only re-enacted with substantial alterations.

The purpose of the Act is indicated by its title, “an Act to consolidate and amend the law relating to agricultural tenancies and certain other matters in Agra,” and it may be described as a Code of landlord and tenant law for the province of Agra. At the end of that part of the Act which dealt with the subject of rent and of the machinery whereby in certain circumstances rent might be enhanced or abated, there was a fasciculus of sections entitled “exceptional provisions,” including three sections which require to be noticed. Section 72 empowered a Court making a decree in a suit for arrears of rent to allow, with the sanction of the Collector, such remissions from the rent payable as might appear to the Court to be just, if the produce of the land had been so diminished by drought, hail, deposit of sand or other like calamity during the period for which the arrears were claimed that the full amount of rent payable by the tenant for that period could not be equitably decreed. The section then provided that where rent was thus remitted, the revenue authorities should, on the report of the Court, grant a remission of land revenue in proportion to the rent remitted for the corresponding area belonging to the same landlord. Section 73 dealt with the converse case, and provided that when for any cause the Local Government, or any authority empowered by it, remitted or suspended for any period the whole or any part of the revenue payable in respect of any land, a Collector might order that the rents of the tenants should be remitted or suspended to an amount which shall bear the same proportion to the whole of the amount payable in respect of the land as the revenue of which the payment has been so remitted or suspended bears to the whole of the revenue payable in respect of such land.

By S. 74, an order passed under S. 73 was not to be questioned in any civil or revenue Court, and no suit was to lie for the recovery of any rent of which the payment had been thus remitted or suspended. It will be seen therefore that, in the first case, the remission or suspension of land revenue followed the remission or suspension of rent allowed by the Court and sanctioned by the Collec-

1. (38) 25 A I R 1938 All 158 : 174 I C 505 : ILR (1938) All 114 : 1937 A L J 1396, Muhammad Abdul Qaiyum v. Secretary of State.

tor; and that, in the second, remission of rent might be ordered by the Collector only after the Local Government had remitted or suspended the land revenue. Section 73 was expressly extended to thekadars by S. 219 of the Act, but not S. 72. The reason no doubt was that where the parties had embodied their contract in a formal written instrument, they must in agreeing upon the amount of rent be assumed to have had in mind the possibility of such occurrences as were dealt with in S. 72; but a remission or suspension of land revenue under S. 73 would destroy the basis upon which they must necessarily have contracted and it would be inequitable if a consequential adjustment were not permitted.

In 1931, the United Provinces were faced with a catastrophic fall in agricultural prices followed by threats to withhold rent on a large scale. Faced with what was clearly a most difficult situation, the Government appears to have acted with courage and promptitude. It took the view that the most urgent problem was that of rent, and devised a scheme for the systematic reduction of rents, varying with the circumstances of the different districts, followed later by consequential adjustments in land revenue. The plans adopted were described in a series of communiques issued from time to time, the first being dated 29th April 1931 and the last 28th October 1932. The Government appears to have been well aware of the legal position, for, in its last communique, a statement on the report of the rent and revenue committee of the Legislative Council, it observed that

the Governor in Council recognizes that the action which Government were compelled to take last year was not covered by any provision in the existing law, and he is as anxious as any party that the position should be regularized as soon as possible. But owing to the magnitude of the problem the process will inevitably take time. The law was not framed to meet such a position as has arisen from the recent severe fall in prices.

The Government, in other words, were faced with a problem with which executive governments have often to deal; a grave emergency, threatening public order, and inadequate powers for meeting it. In circumstances such as these, a government has to do the best it can, relying, if it exceeds the limit of its powers, upon the willingness of the Legislature to indemnify it subsequently; and Legislatures are usually prepared to grant a government absolution, if they are satisfied of the gravity of the emergency, of the bona fides of the action taken, and of the reasonableness of the measures

adopted. A government however always runs the risk of the measures which it has taken becoming the subject of legal proceedings before it has obtained its indemnity, and this is what happened in the present case. It is clear that S. 73 of the Act, only enabled remissions of rent to be ordered, if there had been a prior remission of land revenue; and therefore the orders of the Government on this occasion had no legal force or effect and could not be relied upon by any tenant in a suit by his landlord for the recovery of arrears of rent. The Allahabad High Court so decided, as I have already stated; and it was because of this decision that the Government found themselves compelled to invite the Legislature to pass the Act which is the subject of the present appeal; the question is whether that Act is effective for the purpose for which it was designed. I think it right to observe, in justice to the Government, though the matter does not of course affect the legal position, that while no doubt its action exposed it to much criticism, a substantial number of landlords were willing to co-operate with it in meeting the emergency. This appears from the communique of 11th May 1931 in which the Government recorded its appreciation of the spirit shown by a deputation of the taluqdars of Oudh who had waived their legal claims and agreed without condition to remit whatever Government considered fair to their tenants; and also of the generosity with which the Agra landlords had shown their willingness to grant remission to a large number of cultivators. It is desirable that this should be said, for Courts of justice, while giving no countenance to the theory that governments are at liberty to break the law whenever they find it convenient to do so, ought to abstain from harsh or ungenerous criticism of measures taken in good faith by those who bear the responsibility of government, when suddenly faced with a serious and perhaps dangerous situation.

The Regularization of Remissions Act, 1938, had been passed before the present appeal came before the High Court, and when the appellants sought to take advantage of it, on the ground that the respondents could no longer challenge the validity of the remission orders, the latter replied by challenging the new Act itself. This point was referred to a Full Bench, which held the Act to be beyond the competency of the Legislature to enact. The three learned Judges who composed the Bench

(Iqbal Ahmad, Bajpai and Mohammad Ismail, JJ.) all took the view that the Act was contrary to the provisions of S. 292, Constitution Act, because it attempted to legislate retrospectively; but Iqbal Ahmad J. was also of opinion that none of its provisions were with respect to any of the matters set out in List 2 of Sch. 7 to the Constitution Act, nor indeed with respect to any of the matters in List 3, the Concurrent List.

Before the case was heard by the Full Bench, the High Court had caused notice to be given to the Advocate-General of the Province, in order that, if the United Provinces Government so directed, he might appear and support the validity of the Act. The Advocate-General was accordingly heard; and when, after the Full Bench had given judgment, the case came again before the High Court to be finally dealt with, the Government applied to be made a party to the appeal, in order that (as the application stated) it might have a right of appeal to the Federal Court. The application not being opposed, the Government was duly made a party; and its name appeared thereafter as respondents on the record, under the style of the United Provinces Government, in addition to those of the plaintiffs-appellants and the defendants. In the final order of the High Court, however, admitting the appeal to this Court, the parties on the record are described as "the United Provinces, Applicant (*sic*) to the Federal Court," with all the original plaintiffs and defendants as respondents. It is in that form that the appeal has now come before us. It should be added that the defendants did not enter an appearance in this Court and only the United Provinces and the plaintiffs were represented at the hearing.

In these circumstances counsel for the lessors took a preliminary objection and contended in a very able argument that the Advocate-General ought not to be heard, because the High Court had no power to make the Province a party to the suit and the Province had therefore no right to appeal. He put it as a matter of jurisdiction and not merely as a wrongful exercise of discretion by the High Court. The application of the United Provinces was made under O. 1, R. 10 (2), Civil P. C., the material words of which are as follows :

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any person who ought to have been joined, whe-

ther as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, to be added.

Counsel for the lessors argued that the desire of the Province to secure the right of appeal did not make O. 1, R. 10 (2) applicable to the case; but, he also based his argument on broader grounds and contended that the mere fact that the validity of provincial legislation was being challenged was no sufficient reason for making the Province a party to a suit between private persons.

I desire to say at the outset that, assuming for the moment that there was jurisdiction to add a party to represent the executive Government of the Province, that party ought not in my opinion to have been the Province itself. It is true that by section 176 (1), Constitution Act, a Provincial Government may sue or be sued by the name of the Province, and may, subject to any provisions which may be made by Act of the Federal or the Provincial Legislature, sue or be sued in relation to its affairs in the like cases as the Secretary of State in Council might have sued or been sued if the Act had not been passed. But it seems to me that where the validity or constitutionality of provincial legislation is in issue, and not any matter relating to the proprietary rights or interests of the Province, it is more convenient and more correct that the Advocate-General should represent the executive Government for the time being of the Province. This is the Dominion practice, and in my opinion it ought to be followed in India. The Secretary of State was first made liable to be sued by S. 65, Government of India Act, 1858, and the same suits and remedies were made available against him as had been available against the East India Company. He was no doubt substituted for the East India Company after the transfer of all the rights of the Company to the Crown, because under the constitutional arrangements made by the Act of 1858 he had complete control of all the revenues of India. But the question of the constitutionality of an Indian statute could rarely have arisen before the present Constitution Act, and even more rarely still in the case of a provincial statute; and it seems to me, as I have said, that the more convenient course is to confine the operation of S. 176 (1) to cases in which the proprietary rights or interests of the Provinces are affected, and, if the Government of a Province desires to uphold the validity of a Provincial Act or to challenge that of

a Federal Act, it should direct the Advocate-General of the province to intervene on its behalf.

A number of cases were cited on the true construction of O. 1, R. 10. Counsel for the lessors relied principally upon 50 Mad 34,² in which Srinivasa Ayyangar J. refused an application by the Secretary of State to be added as a party in a case said to involve the question whether an Act of the Provincial Legislature was ultra vires. The learned Judge, treating the case as one of first impression, held that the words "all the questions involved in the suit" must refer to questions as between the parties to the litigation, that neither on principle or authority could the Secretary of State be regarded as a necessary or a proper party, and that he ought not to be joined as an additional defendant. He concluded his judgment with these words :

Having regard to the number and variety of legislative bodies and authorities in the country at the present day, paramount, imperial, local, delegated, subordinate, etc., I feel that questions of ultra vires are certain to be raised in the Courts in increasingly large numbers of cases and I refuse to contemplate with equanimity the prospect of the Secretary of State for India being required by every defendant to be made a party in every one of them.

This judgment was criticised and dissented from in A I R 1929 Mad 448³ by Venkata Subbarao J., a case in which the plaintiff had brought a suit against a district board for a declaration that he had been duly elected a member of the board by a resolution passed at the meeting of a certain taluq board. The Government applied to be joined as a defendant, but both plaintiff and defendant opposed the application. It was held that since by a local Act Government had the power of control over all local boards in the province and could suspend the execution of any resolution (as they had apparently done in the case of the taluq board), it was a proper party to the suit and ought to be added. The learned Judge was of the opinion (which I cannot myself share) that Srinivasa Ayyangar J., had in the earlier judgment ignored the distinction made in O. 1, R. 10 between (1) persons who ought to have been joined, and (2) persons whose presence is necessary to enable the Court completely and effectually to adjudicate upon and settle all the questions involved in the

suit, i. e., between necessary parties and proper parties. Basing his opinion on earlier English and Indian authorities, he held that the Court was not bound to decide a dispute in the absence of persons whom it most vitally concerned, and that in the case before him it was the Government who had interfered with the alleged right of the plaintiff by suspending the execution of the resolution of the taluq board. Hence he concluded that the Government was a proper party to the suit.

It is not clear to me that Srinivasa Ayyangar J., would have come to a conclusion contrary to that of his brother Judge, if the later case had come before him; for different principles appear to be involved in the two cases. The question of the validity of the Act could certainly have been decided in the absence of the Secretary of State in the first case, though it might have been convenient to have him represented before the Court. In the second case, it was in effect the action of the Government itself of which the plaintiff complained. But it is obvious that in the later case a wider view was taken of the powers conferred by O. 1, R. 10, and stress was laid rather upon the words "effectually and completely to adjudicate upon and settle all the questions involved in the suit" than upon the words "necessary to enable the Court" which preceded them. The Allahabad High Court appear to have gone further in 55 ALL 825⁴ and to have held that the Court has inherent powers of its own in the matter which are not restricted by O. 1, R. 10; but I should always hesitate to rely on unspecified and undefined inherent powers as a justification for any action taken, if it is possible to avoid doing so. In any case, the first of the Madras decisions is directly in point in the present case, though the report does not indicate how the question of ultra vires in fact arose in connection with the provincial statute which was under discussion, nor is it easy to see how under the Government of India Act, 1919, and the Devolution Rules, questions of ultra vires in the case of provincial statutes could have come before the Court. The decision in the later case may have been justified on the facts, but those facts were very different from those which are now under consideration.

Since the new Constitution Act, however, the position with regard to the competence of Indian Legislatures, whether the Central

2. ('26) 18 A I R 1926 Mad 886 : 95 I O 214 : 50 Mad 34 : 51 M L J 148, Prayaga Doss Jee Varu v. Board of Commissioners for Hindu Religious Endowments, Madras.

3. ('29) 16 AIR 1929 Mad 448 : 118 I O 780, Secretary of State v. Murugesu Mudalliar.

1941 F.O./8b, 4 & 5a

4. ('34) 21 A I R 1934 All 4 : 149 I O 704 : 55 All 825 : 1938 A L J 1572, Mt. Jaimala Kunwar v. Collector of Saharanpur.

Legislature or the Legislatures of the Provinces, is completely changed; and the cases which have already come before this Court during its brief history show the difficulty and complexity of the disputes in which questions of legislative competence are involved. I think that it would be a matter of great regret to this Court if in any such case it had not the assistance of the Advocate-General of the Province concerned, and this point was not overlooked when the rules of the Court were drafted: *see* Federal Court Rules, O. 36. But, in the absence of such an express rule in the Code, it is necessary to decide, first, whether the Advocate-General was rightly empowered to intervene as a party on the record, and, secondly whether in the particular circumstances of the present case he has an independent right of appeal.

It can but rarely happen, in cases between private persons involving the constitutional validity of a statute, that an Advocate-General is a "necessary" party; and I am not prepared to say without further consideration that he is even a "proper" party in each and every case. But in a number of cases, of which the present is an example, the question whether a statute is or is not valid involves the question of the scope of the executive authority of the province. The executive authority of a province vests in the Governor on behalf of the Crown, and extends to all matters with respect to which the Legislature of the province has power to make laws (S. 49, Constitution Act). If then a provincial Act purporting to confer powers upon the executive is held to be beyond the competence of the Provincial Legislature, the scope of the executive authority of the province is thereby declared to be more restricted than Legislature and Government had supposed or intended. If the Act impugned in the present case is held to be invalid, orders issued by or under the authority of the Provincial Government in the past can be questioned in a Court of law, and the Government would have no power to issue any orders of the kind in the future. It is therefore impossible for a Court so to decide in litigation between private parties without imposing a hitherto unsuspected restriction upon the powers of the Government; and it does not seem right that this should be done without the Government being a party to the proceedings before the Court. In my opinion, the Advocate-General of the province is a proper party, in the sense that without him the Court cannot effectually and completely

adjudicate upon and settle all the questions involved in the suit. I am not prepared to extend the operation of O. 1, R. 10, beyond what is necessary, but it seems to me that to allow the Advocate-General to intervene as a party in cases of this kind is for the reasons which I have given within the spirit and I think also the letter of the rule.

The Judicial Committee held in (1920) A C 358⁵ that when an action, if successful, will affect the rights claimed by the Crown, but the plaintiff has against the Crown no claim to which the procedure by petition of right is applicable, the Attorney-General is nevertheless a necessary and proper party and may be joined as a defendant by the plaintiff. In that case the validity of a Crown grant, and not of a statute, was challenged, but I draw attention to the following observations of Lord Buckmaster, who delivered the judgment of the Committee :

It is quite true that the title of the Crown to the land in question is not in controversy, nor is the Crown asked to do any act or grant any estate or privilege; but in the event of the plaintiffs' success, the rights existing in the Crown and consequent upon the grant to the respondents will cease. If these interests lay in a third party, he ought certainly to be added as a defendant and that is the best means of testing the necessity of the attendance of the Crown (at page 363).

Adapting these words, I might say that in the event of the lessors succeeding in the present case, certain rights of the Crown, that is, of the executive, of the province will cease to exist, in the sense that they will no longer have that extended effect which it was believed that the impugned Act had given them. In a recent case in a Canadian Province, (1937) 3 D L R (Ont) at p. 458,⁶ a local Judicature Act had provided that no Act of the Provincial Legislature should be adjudged invalid in any proceedings until after notice had been given to the Attorney-General of Canada and to the Attorney-General of the province and that the two Attorneys-General were entitled as of right to be heard, notwithstanding that the Crown was not a party to the proceedings. This enactment was held not to preclude the making of the Crown, represented by the Attorney-General, a party to an action, and the Court stating that in cases admitting of doubt it was desirable that the Crown should be made a party, declared the Attorney-General to be a proper, if not

5. (1920) A C 358 : 89 L J P C 27 : 122 L T 563 : 36 T L R 49, *Esquimalt and Nanaimo Railway Co. v. Wilson*.

6. (1937) 3 D L R (Ont) at p. 458, *Beauharnois L. H. & P. Co. v. Hydro-Electric Power Commission*.

a necessary, party to the litigation before it. It is not necessary for me to say whether I agree with this more general proposition; I am content to limit my observations to cases where to challenge the validity of a statute would, if successful, affect the executive authority of the province. It would no doubt be often, perhaps usually, convenient if the Court had the Advocate-General of the province before it, when the validity of a provincial statute is in issue: and High Courts may desire to consider whether they should not frame a rule of their own upon the subject which will set all doubts at rest.

It seems to me however by no means to follow that, because the Advocate-General of the province has been permitted to be put on the record as an intervener in the suit, he is also entitled to prefer an independent appeal to this Court, in the absence of any appeal by the parties. He has an interest in the litigation, it is true, but the suit is after all between private parties; and if they are content with the decision of the Court, whether it be in favour of the plaintiff or the defendant, it is difficult to see on what principle the Advocate-General can be held to have a locus standi sufficient to justify an independent appeal of his own. If one of the parties appeals, then of course the Advocate-General has a right to appear before this Court, since he is an intervener in the suit; but he is a party only in a very special and limited sense. The doubts which I have felt on this point are not diminished by a very recent decision of the Canadian Supreme Court: (1937) Can S C R 427.⁷ In that case the Supreme Court of Alberta had held that a statute under which a husband had been ordered to pay a certain sum towards the maintenance of his wife was beyond the competence of the Provincial Legislature to enact. The Attorney-General of the Province had intervened to uphold the validity of the Act, and special leave to appeal to the Supreme Court of Canada had been granted both to the Attorney-General and to the wife, but the wife failed to perfect her appeal. The Supreme Court were of opinion that though, on an appeal to the Court by the wife, the Attorney-General would, in the ordinary course, have the right to appear in order to support the validity of the Act, he had no status to appeal to the Court, so long as the wife had not perfected her appeal, and that until she had done so

the Court had no jurisdiction. This decision seems to me, if I may respectfully say so, to be based upon sound principle, and in my opinion this Court ought to follow it. There is a significant observation by Lord Haldane in (1915) A C 320⁸ at p. 334, that Attorneys-General intervening in private litigation were only entitled to present their views to the Judicial Committee and had no right of reply. If an Attorney-General had in such circumstances an independent right of appeal of his own, it is difficult to see why he should not be allowed a right of reply like any other appellant.

I should be disposed to hold therefore in favour of the lessors on the preliminary point; but as both my brethren are of a different opinion, I will not formally dissent from them. I am very conscious of the difficulty which might be caused if the doubts which I have thought it right to express were justified, for, private persons could by a private settlement of their dispute, or even by collusion, prevent a Provincial Government from obtaining a decision of the Federal Court on issues of the highest importance. This is a matter which might well engage the attention of the Central Legislature, who have power under S. 215, Constitution Act, to make provision for conferring on the Federal Court such supplementary powers not inconsistent with any of the provisions of the Act as may appear necessary or desirable to enable the Court more effectively to exercise the jurisdiction conferred upon it by or under the Act. I now come to the impugned Act itself. The Preamble to the Act runs as follows:

Whereas it is necessary to regularize the remissions of rent made before the passing of this Act on account of the fall in prices,
and S. 2 then provides that
notwithstanding anything in the Agra Tenancy Act, 1926, or the Oudh Rent Act, 1886, or in any other law for the time being in force where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court.

All three Judges in the High Court have held that these provisions were beyond the competence of the United Provinces Legislature by reason of S. 292, Constitution Act. That section provides that

7. (1937) Can S C R 427, Attorney Gen. of Alberta (Intervenant) v. Kazakewich.

8. (1914) 1 AIR 1914 P O 174 : (1915) A, O 330 : 84 L J P O 64 : 112 L T 183 : 31 T L R 35 (P O), John Deere Plow Co. v. Wharton.

Notwithstanding the repeal by this Act of the Government of India Act, (that is to say, the Government of India Act, 1919), "but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part III of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority".

It is said that since these words keep existing British Indian laws in force until they are altered or repealed or amended by competent authority, it is beyond the powers of any authority, no matter how competent otherwise, to legislate with retrospective effect; because, if they do so, they are contravening the provisions of the section which makes those laws continue in force up to the moment of alteration, repeal or amendment. The purpose of S. 292 was clearly to negative the possibility of any existing Indian law being held to be no longer in force by reason of the repeal of the law which authorized its enactment; and it is a safeguard usually inserted by draftsmen in similar circumstances. An analogous provision was included in S. 130, Government of India Act, 1919, though in that case it took the form of a proviso that the repeal of earlier Government of India Acts should not affect the validity of any existing law. The Union of South Africa Act, 1909, S. 135, is almost identical with S. 292, but a slightly different formula was adopted in the British North America Act, 1867, and in the Commonwealth of Australia Constitution Act, 1900. Section 129 of the former is as follows :

Except as otherwise provided by this Act, all laws in force in Canada, Nova Scotia or New Brunswick at the Union . . . shall continue in Ontario, Quebec, Nova Scotia and New Brunswick respectively as if the Union had not been made ; subject nevertheless . . . to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province, according to the authority of the Parliament or of that Legislature under this Act.

Section 108, Australian Act is as follows :

Every law in force in a Colony which has become or becomes a State, and relating to any matter within the powers of the Parliament of the Commonwealth shall, subject to this Constitution, continue in force in the State; and until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have such powers of alteration or repeal in respect of any such law as the Parliament of the Colony had until the Colony became a State.

I pause here to inquire what reason there can have been for Parliament to place such a fetter as is suggested upon the powers of the new Indian Legislatures. No such fetter was imposed by S. 130, Government of India

Act, 1919, for there is nothing in the words of that section which could by any stretch of language be construed as a prohibition of retrospective legislation. But the suggestion now is that the new Legislatures set up by the Act of 1935, which have certainly been given powers no less wide than those of their predecessors, have nevertheless had a restriction imposed upon them which Parliament admittedly saw no reason to impose at an earlier date. I agree that it is not for this Court to speculate upon the reasons which may have induced Parliament to legislate in one way rather than another; but when I am told that these novel and unexpected provisions have been enacted and that no apparent reason can be assigned for them, I am entitled to ask whether it is not possible to place a different and more reasonable construction upon the language which Parliament has used. It then appears that Parliament has used almost identical language when it enacted the constitution of the Union of South Africa ; and the industry of counsel was unable to suggest, nor have I myself been able to discover, that the interpretation which commended itself to the High Court of Allahabad has ever been even hinted at in any South African Court. The same may be said of the Canadian and Australian sections; for though it is true that the wording of those sections is a little different, I confess that I can detect no difference in the meaning of the language used.

I find myself unable to agree with the decision of the High Court on this point, and it is only out of respect for the three learned Judges who have taken a contrary view that I have dealt with the question at any length; for, but for their unanimous opinion, I should have thought it scarcely open to argument. It must always be remembered that within their own sphere the powers of the Indian Legislatures are as large and ample as those of Parliament itself, (1878) 3 A C 889⁹ and the burden of proving that they are subject to a strange and unusual prohibition against retrospective legislation must certainly lie upon those who assert it. I can see nothing in the language of S. 292 which suggests any intention on the part of Parliament to make them subject to that prohibition, nor, so far as that may be relevant, any explanation why Parliament should have desired to do so. The sections in the Dominion Acts to which our attention was called do not seem to have

been cited to the learned Judges in the High Court; and I cannot but think that their decision might have been different if they had had those sections before them.

Apart however from the above considerations, I doubt whether the Regularization of Remissions Act does in fact alter, repeal or amend any existing Indian law. There is nothing in it inconsistent with, or repugnant to, the Agra Tenancy Act, 1926. No doubt it adds another case in which a tenant may claim the benefit of remissions of rent as against his landlord to those already specified in the latter Act; but it appears to me to have succeeded in doing so without touching any of the provisions of that Act itself. The view that the Regularization of Remissions Act was invalid because it was not enacted 'with respect to' any of the matters enumerated in List II or List III of Sch. 7 to the Constitution Act, though it was strenuously argued in this Court, only found favour in the High Court with Iqbal Ahmad J., the two other Judges holding that the Act was within items No. 2 or 21 of List II, or partly within one and partly within the other. These two items are as follows:

2. Jurisdiction and powers of all Courts except the Federal Court, with respect to any of the matters in this List; procedure in rent and revenue Courts.

21. Land, that is to say, rights in or over land, land tenures, including the relation of landlord and tenant, and the collection of rents; transfer, alienation and devolution of agricultural land; land improvement and agricultural loans; colonization; Courts of Wards; encumbered and attached estates; treasure trove.

I am of opinion that in enacting the Act the Legislature has legislated with respect to matters covered by item 21. The subjects dealt with in the three legislative lists are not always set out with scientific definition. It would be practically impossible for example to define each item in the Provincial List in such a way as to make it exclusive of every other item in that list, and Parliament seems to have been content to take a number of comprehensive categories and to describe each of them by a word of broad and general import. In the case of some of these categories, such as "Local Government," "Education," "Water," "Agriculture" and "Land," the general word is amplified and explained by a number of examples or illustrations, some of which would probably on any construction have been held to fall under the more general word, while the inclusion of others might not

be so obvious. Thus "Courts of Wards" and "treasure-trove" might not ordinarily have been regarded as included under "Land," if they had not been specifically mentioned in item 21. I think however that none of the items in the lists is to be read in a narrow or restricted sense, and that each general word should be held to extend to all ancillary or subsidiary matters which can fairly and reasonably be said to be comprehended in it. I deprecate any attempt to enumerate in advance all the matters which are to be included under any of the more general descriptions; it will be sufficient and much wiser to determine each case as and when it comes before this Court. I am moved to make this observation because of a passage in the judgment of Iqbal Ahmad J., in which he says:

By the authority given to it to make laws about the "collection of rents" the Provincial Legislature is in my judgment authorized to provide about payment of rent in cash or in kind; to fix the instalments in which rent is to be collected, to make provision about abatement or enhancement of rent, to prescribe the conditions under which the rent may be remitted, to regulate the method by which rent is to be collected and to legislate about kindred matters. The impugned Act, however, is not with respect to any such matter. It is therefore outside the scope of entry 21 of the Provincial List.

I do not know why the learned Judge should assume that the list of illustrations which he gives is necessarily exhaustive. I agree that, if it were, his conclusion might follow logically from his premises; but such *a priori* assumptions are a dangerous guide for the construing of a statute. The general descriptive words in item 21 include "the collection of rents"; and if a Provincial Legislature can legislate with respect to the collection of rents, it must also have power to legislate with respect to any limitation on the power of a landlord to collect rents, that is to say, with respect to the remission of rents as well as to their collection. Item 22 of the Provincial List is "forests"; could it reasonably be argued that the power to legislate with respect to forests did not include a power to legislate with respect not only to afforestation but also to disafforestation? Item 24 is "fisheries"; could it reasonably be argued that this only included the regulation of fishing itself and did not include the prohibition of fishing altogether in particular places or at particular times? I have no doubt that legislation with respect to the remission of rents is legislation with respect to a matter included in item 21.

It is then necessary to inquire whether the impugned Act is an Act with respect to "remission of rents," for, if it is, it follows from what I have just said that it was within the competence of the Provincial Legislature to enact it. In my opinion, it is such an Act, although it may also be an Act with respect to something else, that is to say, the validation of doubtful executive orders. It does not seem to me necessary to consider what the pith and substance of the Act is, to use a now familiar phrase; for that question does not arise, unless the Court is inquiring whether a particular Act falls within one Legislative List or another. In the present case, there is no suggestion of any competition between List I and List II, and if the Act does not fall within List II, (since no one has suggested that it falls within List III), it can only be an Act with respect to a subject-matter which has been overlooked or forgotten, and no Legislature in India could deal with it until the Governor-General had exercised his powers under S. 104, Constitution Act. The validation of doubtful executive acts is not so unusual or extraordinary a thing that little surprise would be felt if Parliament had overlooked it, and it would take a great deal to persuade me that legislative power for the purpose has been denied to every Legislature, including the Central or Federal Legislature, in India. It is true that "validation of executive orders" or any entry even remotely analogous to it is not to be found in any of the three Lists; but I am clear that legislation for that purpose must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subjects in respect of which the executive orders may have been issued.

I arrive at the conclusion therefore that the remission of rent is a matter covered by item 21, that the impugned Act is an Act with respect to the remission of rent, and that it was within the competence of the United Provinces Legislature to enact it. On this view of the matter, it is not necessary to decide whether the Act is also with respect to matters covered by item 2, that is to say, "Jurisdiction and Powers of the Provincial Courts"; but, if it had been otherwise, I should have been disposed to say that the jurisdiction and powers of the Courts are not affected merely because certain executive orders are not allowed to be questioned in any Court. If the Act had provided, as it well might, either that these particular orders, if produced from the pro-

per custody, should prove themselves, or (if the Act is to be given a rather wider interpretation) that they should be conclusively presumed to have been lawfully made, then it does not seem to me that any doubt could have arisen, unless indeed any Act relating to evidence must also be held to relate to the jurisdiction and powers of the Courts; but this can scarcely be so, in view of item No. 5 in the Concurrent List. If, on the other hand, it were to be contended that the impugned Act was an Evidence Act and therefore in competition with List III then I should have no hesitation in holding that its pith and substance is rent or remission of rent and not an amendment of the law of evidence, and that therefore it still fell within List II.

Two other points were raised in the course of the argument, but they need only be mentioned to be dismissed. There is nothing in the contention that the Act is void under S. 299 (3), Constitution Act, because the prior sanction of the Governor had not been obtained to the introduction of the Bill, since it is completely disposed of by the provisions of S. 109 (2). The contention that the Act bars a civil remedy and therefore conflicts with ss. 4 and 9, Civil P. C., a matter falling under List III, so that by reason of S. 107 (2), Constitution Act, the assent of the Governor-General would be required to make an Act passed by a Provincial Legislature with respect to it valid, is equally barren of substance. Section 4 of the Code only applies "in the absence of any specific provision to the contrary" and S. 9 excepts suits which expressly or impliedly are not cognizable by the Courts.

But, if, as I hold, the Regularization of Remissions Act was not beyond the competence of the Legislature to enact, the question still remains what is to be the effect of such a decision. The thekadars, the original defendants, entered no appearance in this Court, and the province was the only appellant. The province was not interested in any way in the original dispute between the plaintiffs and the defendants, save to uphold the validity of a particular law which had been challenged in the course of the proceedings. It is, in my opinion, impossible for this Court, at the instance of a third party who had no direct interest in the original suit, to order the High Court to vary the decree which it has given as between plaintiffs and defendants; and the difficulties which would arise if any other view were taken lend additional force to the doubts

which I have already expressed on the right of the province to appeal at all. I think therefore that the appeal should be dismissed, and my brothers concur, though for different reasons. In these circumstances it is not necessary for me to express an opinion on two other points which were strongly argued before us by counsel for the lessors, that is to say, whether the Act ought to be construed as having no application in the case of suits pending at the time when it is passed, and whether the provision in it which forbids the remissions from being questioned in a Court of law has the effect of validating them for all purposes, and of preventing any suit for recovery of the rent alleged to have been remitted. Many interesting questions of law arise in connection with both these points, which might be profitably discussed on a more appropriate occasion, but I express no opinion on them now. The appeal will be dismissed. There will be no order as to costs.

Sulaiman J.—This is an appeal by the United Provinces which intervened and were impleaded in the second appeal before the High Court. The present suit was instituted on 5th December 1934, by two landholders for their share of the arrears of rent for the period, 1339-1341 Fasli (1931-1934 A. D.), against the defendants who were thekadars (lessees of proprietary rights in agricultural lands) under a registered document, dated 20th April 1928, fixing an annual rent of Rs. 948 and entitling the thekadars to make collection of rents from tenants. The defendants claimed a deduction on account of remissions of rent which had been ordered. The Assistant Collector rejected the plaintiffs' contention that remissions could not be set off under the terms of the thekanama, made a deduction of Rs. 908-8-3 on that account in the rent for the years in suit, and allowing for Rs. 105 as remission in revenue, decreed the suit in part. On appeal, the District Judge rejected the contention that the scale of remission of rent was excessive and upheld the first Court's decree.

On 26th September 1935, the landholders appealed to the High Court and in their grounds Nos. 2, 3 and 6 urged that it had not been shown that remissions in revenue and rents were made under S. 73, Agra Tenancy Act (Act 8 of 1926), and that the decision of the Assistant Collector was not final under S. 74 of that Act, which had been misconstrued. Another suit, which had been filed by Muhammad Abdul Qaiyum, a landholder, in 1935, against the Secretary of

State, for a declaration that orders for remission of rents previously made were not legally authorized and for injunctions and damages, came up in appeal before the High Court and was disposed of on 13th May 1937: I L R (1938) ALL 114.¹ The High Court held that the remissions, not being in accordance with S. 73, Agra Tenancy Act, were ultra vires and illegal, and S. 74 of that Act was not a bar to that suit; but the suit was dismissed on the ground that the then plaintiff should have sued his tenants ignoring the remissions. While the appeal in the present case was pending in the High Court, the impugned Act, viz., the U. P. Regularization of Remissions Act (Act 14 of 1938) came into force on 24th September 1938. The appeal came up before a Bench of two Judges who allowed time to the U. P. Advocate-General to consult his Government whether they would like to be heard on the question of the ultra vires nature of the impugned Act. Later, the question of law whether Act 14 of 1938, was or was not intra vires the Legislature, was referred to a Full Bench of three Judges for an authoritative pronouncement. Before the Full Bench the Advocate-General was allowed to be heard on behalf of the Government. Although there were differences of opinion on some of the points raised in the case, all the three learned Judges ultimately came to the conclusion that the Act was ultra vires the Legislature. The case then went back to the Division Bench. On 8th April 1940, an application was presented on behalf of the United Provinces Government praying that the Government be formally impleaded as a party to the case. The application came up for disposal on 9th April 1940. The Court ordered, "This application is not opposed. Let the United Provinces Government be made a party to the appeal." On 12th April 1940, the Division Bench, accepting the opinion of the Full Bench, allowed the appeal and decreed the claim to the extent of the remissions. On the same date the High Court granted the required certificate under S. 205 (1), Government of India Act. The appeal was finally admitted on 18th June 1940.

Preliminary objection—Mr. Pearey Lal Banerji has raised a preliminary objection to the hearing of the appeal filed by the United Provinces. The statement in the order of the High Court that the application was not opposed and the fixing of a date with consent, implied that some advocate for the plaintiffs-appellants was present and did not think it fit to oppose the application. There is

no affidavit before us to show that both of the appellants' advocates were absent, or to show that the advocate who was present had no authority to accept notice. They admittedly appeared at the next hearing. It is however urged that their acquiescence would at best amount to an admission on a point of law that an application for impleading the United Provinces Government was not improper, and so there should be no estoppel against the objection being considered on its merits here.

Section 107 (2), Civil P. C., confers on an appellate Court the same power and directs it to perform, as nearly as may be, the same duties as are conferred on Courts of original jurisdiction. Courts of original jurisdiction have under O. 1, R. 10 (2), Civil P. C., power to order that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved, be added. A person would be a necessary party if he ought to have been joined, that is to say, in whose absence no effective decree can be passed at all. He would be a proper party to be impleaded if his presence is necessary for an effectual or complete adjudication. In a suit between a landholder and his tenant, the Provincial Government cannot be considered a necessary party at all, as a proper decree can certainly be passed in their absence. But when in such a suit the validity of an Act of the Provincial Legislature is in question, the adjudication would affect a large section of the public, and the Provincial Government would be indirectly interested in such an adjudication. In the present case, the Government were interested to this further extent that the effect of the High Court's ruling would be to nullify certain orders, previously issued by the Government, the enforceability of which was indirectly attempted by the impugned Act. Apparently, the defendants were too poor to think of preferring an appeal to the Federal Court; and the High Court thought that it would not only be convenient but quite fair to make the U. P. Government a respondent to enable it to secure a more authoritative pronouncement. As the Act was passed during the pendency of the High Court appeal, there was no earlier occasion on which the Government could have been impleaded. It is contended before us that the powers of an appellate Court are restricted within the limits imposed by O. 41, R. 20, and that

the same restriction is imposed on a Court hearing a second appeal under O. 42, Civil P. C. That rule no doubt permits of making a person respondent, who was a party to the suit in the original Court, and who has not been made a party to the appeal, but is interested in the result of the appeal. Obviously, this rule would not apply to the present case. But the language of the rule does not show that it is exclusive or exhaustive so as to deprive a Court of any inherent power which it may possess and can exercise in special circumstances, and which has been saved by S. 151, Civil P. C.

The Allahabad High Court in 55 ALL 825⁹ at p. 832 referred to some cases where it had been held that there is also an inherent jurisdiction to add a new party even outside O. 41, R. 20. There is nothing in A I R 1925 ALL 768¹⁰ which in any way conflicts with this. Unfortunately, the headnote of that case is incomplete. It was obviously not intended to lay down that the appellate Court has no power to implead a person who was no party to the original suit at all. All that was said was that there was no such power under O. 41, R. 20, Civil P. C. It was pointed out that S. 107, Civil P. C., gives an appellate Court powers, generally speaking, of the trial Court. In that case the District Judge had impleaded a new person in the appeal and then set aside the decree of the first Court and "remanded the case for retrial." It was pointed out by the High Court that the proper procedure was to remand the case to the first Court with the direction to implead that person and then to proceed to dispose of the case. It would then have been possible for this new party to file his written statement upon which the Court would be in a position to consider whether there should be a trial de novo on all the issues or whether only some of the issues should be retried. The order of the District Judge for the trial de novo, before knowing what pleas the new party would take, was considered wrong. It was therefore suggested that the more appropriate course should be to direct the Court below to implead him and give him an opportunity to file a written statement. In the present case the impleading of the U. P. Government necessitated no retrial. 37 ALL 57¹¹ was a peculiar case where a pro forma defendant, who had benefited under the first Court's decree,

10. ('25) 12 A I R 1925 All 768 : 88 I C 493 : 47 All 853 : 28 A L J 757, *Shiam Lal v. Dhanpat Rai*.

11. ('14) 1 A I R 1914 All 293 : 26 I C 25 : 37 All 57 : 12 A L J 1277, *Pachkauri v. Ram Khilawan*.

was not impleaded in the first appeal by the principal defendants and was sought to be impleaded in the second appeal by the same defendants long after limitation had expired. The High Court naturally declined to implead him. The earlier cases referred to therein were under the previous Code. I, therefore, find it difficult to hold that the High Court had no jurisdiction at all to implead the U. P. Government as a party to the appeal, particularly when no objection was taken on behalf of the plaintiffs on that occasion. If there were no such jurisdiction at all, then the Provincial Government cannot appeal.

Really, the question before us is not whether the U. P. Government were rightly impleaded. As regards that point, I myself may prefer a different course. The only question that now remains is whether the appeal itself is incompetent on the ground that the High Court erred (assuming that it did) in impleading the U. P. Government. If the discretion was wrongly exercised, that would be no ground for holding that the appeal itself does not lie. Section 205 (2), Government of India Act, lays down that where the certificate under sub-s. (1) has been given (as it has been done in the present case) "any party in the case" may appeal to the Federal Court, on the ground that any such (constitutional) question, as aforesaid, has been wrongly decided. This was not like a case where an Advocate-General may be allowed to intervene merely to present before the Court the point of view of his Government, if such a duty is assigned to him by the Governor under S. 55 (2) of the Act. In such a case, he would have no independent right of appeal. In India we have a specific provision in S. 176 (1) under which a Provincial Government can be sued and therefore made a party by the name of the province. Here the High Court by an express order brought the U. P. Government on the record and then made them a party to the appeal, and indeed it did so with the idea that that would give to the U. P. Government a right to appeal to the Federal Court. It cannot now be said that the U. P. Government were not "any party" in the appeal. Section 205 does not say any party "directly aggrieved by the judgment, decree or the final order," much less "directly aggrieved by the decree actually passed." In the absence of any such restriction in S. 205 and in view of the fact that an appeal lies even on a constitutional question alone without raising any other ground, I am unable to hold that the U. P.

Government who were a party to the appeal in the High Court have no right of appeal at all. Whether, if we allow the appeal, we should direct the High Court to exercise powers similar to that given by O. 41, R. 33, Civil P. C., so as to vary the decree, would be another matter. Several objections were taken to the validity of the impugned Act, 14 of 1938. These may be classified under three heads;

(1) The objection, which has been accepted by all the three learned Judges, is that the Act is void as it offends against S. 292, Government of India Act. (2) The objection, which has been accepted by one of the learned Judges and not the other two, is that the Act is invalid because it is not with respect to any of the matters enumerated in List II, entries 2 and 21, or List III, entry 4, relied upon by the United Provinces. (3) The objections, which have been rejected by all the three learned Judges, are that: (a) the Act is void as it offends against S. 299, Government of India Act; and (b) it is void because it is repugnant to the existing S. 9, Civil P. C.

The respondents have pressed all these before us. The last two can be disposed of summarily.

Section 299 of the Act—The objection taken under S. 299 (3) of the Act that previous sanction of the Governor had not been obtained is completely met by S. 109 (2), as assent was later given to it.

Section 9, Civil P. C.—Similarly, the objection that the Act bars a civil remedy and therefore conflicts with S. 9, Civil P. C., has no force. In the first place, even if there were repugnancy, the Act would under S. 107 (1) be void only to the extent of the repugnancy. Section 9, therefore, cannot stand in the way of its applicability to a revenue case. In the second place, S. 9 itself contains an exception in favour of suits of which cognizance is either expressly or impliedly barred. Section 4, Civil P. C., also contains a saving clause. Not being repugnant to any of the provisions of the Code, the impugned Act does not fall under entries 4 and 15 of List III.

Section 292 of the Act.—S. 292, Government of India Act, contains a saving clause for the continuance of the existing laws.

Notwithstanding the repeal by this Act of the Government of India Act, but subject to the other provisions of this Act, all the law in force in British India immediately before the commencement of Part 3 of this Act shall continue in force in British India until altered or repealed or amended by a competent Legislature or other competent authority.

The High Court has laid a great emphasis on the use of the expression "... shall continue in force ... until altered or repealed or amended." Iqbal Ahmad J. has thought that this section is more than a mere saving or preserving section. Its effect is not merely to declare that the repeal will not affect the validity of the existing laws, but it proceeds further and enjoins that all the laws shall continue in force until altered, repealed or amended. This is thought to imply that the alteration, repeal or amendment of any previously existing law cannot be made with a retrospective effect at all. It is suggested that the word "until" puts a time limit on the power of the Legislatures. As regards the plea that the provisions of S. 2 of the impugned Act should be upheld so far as they relate to the orders passed after the passing of the Act, it has been held that the two portions cannot be separated. Bajpai J. also concurred in holding that S. 292 is mandatory and that the law would continue in force until altered, etc., and that as the impugned Act had attempted to do something indirectly which it could not do directly, this cannot be countenanced. The learned Judge further held that what S. 292 says has to be preserved in terms of the section only, and not in the manner adopted by the U. P. Legislature. Ismail J. held that as the Agra Tenancy Act (3 of 1926), had been neither repealed nor altered at the time the Act was passed, the Legislature was not competent to nullify the provisions of the subsisting Act. The Legislature could not take away the rights conferred by the old Act without repealing or altering the Act.

Although there can be no doubt that the main object of enacting S. 292 was to preserve the enforceability of the then existing laws, the language of S. 292 is certainly more emphatic than would have been ordinarily necessary. Section 130, Government of India Act, 1919, was a similar section couched in a simple language: "This repeal shall not affect the validity of any law, etc., etc." There is a saving provision in S. 129, British North America Act, 1867, but the words there are:

All laws in force in Canada, Nova Scotia or New Brunswick at the Union ... shall continue in Ontario, Quebec, Nova Scotia or New Brunswick, as if the Union had not been made; subject nevertheless to be repealed, abolished or altered ...

Similarly, S. 108, Commonwealth of Australia Constitution Act, 1900, though embodying a somewhat similar provision, has a different phraseology:

Every law ... shall, subject to this Constitu-

tion, continue in the State; and, until provision is made in that behalf by the Parliament of the Commonwealth, the Parliament of the State shall have ... powers of alteration and of repeal, etc., etc.

No doubt in Canada and Australia retrospective legislation has been upheld. But in the constitutions of these Dominions the language, as already quoted, is not identical with that used in S. 292 of the Indian Act. The corresponding S. 135, Union of South Africa Act, 1909, is, however, similar in phraseology to S. 292, Government of India Act. It says:

Subject to the provisions of this Act, all laws in force ... shall continue in force ... until repealed or amended, etc., etc.

In spite of the departure from the phraseology adopted in the constitutions of Canada and Australia, there appear to be no adequate historical grounds for singling out the Union of South Africa for a different treatment. There have certainly been several Acts passed by the Union Parliament which have a retrospective operation, particularly in the case of Marriage Laws, Act 20 of 1913, amending the law in force in the several provinces relating to marriage by banns, contained S. 2 which applied to marriages solemnized "before or after the commencement of this Act." Similarly S. 2 of Act 17 of 1921 provided that any marriage contracted before the commencement of that Act, which would have been void or voidable by reason of any law repealed by that Act, shall (subject to two conditions) be deemed to be as valid as if duly solemnized after the commencement of that Act. Again, there have been Acts passed in the Union which came into effect by the assent of the Governor-General later than the date from which their operation began. Act 29 of 1922, relating to the payment of duty upon the estates of deceased persons and in respect of successions to inheritances, is an instance in point. Our attention has not been drawn to any case where the validity of any South African Act, with a retrospective effect, has been challenged. The passing of such Acts merely shows the interpretation put on S. 129 of the Union Act by the South African Legislature and does not take us very far, so long as there is no judicial pronouncement on their validity.

The difference in the language employed in S. 130 of the old Act and S. 292 of the new Act is certainly marked. The former is in a negative form: "Provided that this repeal shall not affect the validity of any law, etc., etc." The latter is in a positive form: "Notwithstanding the repeal ... all the law ...

shall continue in force until repealed, altered or amended, etc., etc." The former is a mere saving clause, pure and simple, its effect being to make it clear that the mere repeal of the previous Government of India Act shall not ipso facto put an end to the other laws previously in force. The latter is a little more than that, inasmuch as it affirmatively continues the other laws until such laws are hereafter altered, repealed or amended. In the former section, the word "repeal" related to the Constitutional Acts specified in the Schedule attached. In the latter section "repealed, etc.," refer to the other laws which are not repealed etc., by the Government of India Act, 1935, but may thereafter be repealed, etc. The effect certainly is that until altered, repealed or amended, such other laws do continue in force. The High Court was apparently impressed by the obvious departure from the phraseology of the old S. 130, as such a deliberate change is not ordinarily made without a special significance.

There is no doubt that the word "until" does ordinarily connote a point of time. 'Until altered, repealed or amended' is equivalent to saying 'until the alteration, repealment or amendment'. This can have two possible meanings—first, until the date from which the alteration, repealment or amendment takes place, and second, the date on which the Act altering or repealing or amending the previous law is actually passed, or rather when it comes into force. If the Act is retrospective, it would obviously operate from a date earlier than that on which it comes into force. If the view taken in the High Court were to prevail, then no legislation altering, repealing or amending the law which was in force when the Government of India Act was passed, no matter how long afterwards it comes to be passed, can have any retrospective provision so as to affect any transactions prior in time to the date when such Act is actually passed. It would follow that not only the Provincial Legislature but also the Central Legislature would be debarred from giving any retrospective effect whatsoever to any Act by which not only a previous Act but any other law is altered, repealed or amended. This is a drastic consequence which, it is difficult to believe, could have been contemplated. As long ago as 1878, their Lordships of the Privy Council in (1878) 3 A C 389⁹ when speaking of the powers of the Indian Legislature remarked:

When acting within these limits it is not in any sense an agent or delegate of the Imperial Parlia-

ment, but has, and was intended to have, plenary powers of legislation as large and of the same nature as those of Parliament itself.

Even though we are not concerned with the wisdom of the Legislature, one cannot help saying that there appears to be no adequate reason why the power to give retrospective effect to a new legislation should be curtailed, limited or minimized, particularly when S. 292 applies not only to statutory enactments then in force but to all laws, including even personal laws, customary laws and common laws. The suggestion made on behalf of the respondents that the idea was not to permit retrospective legislation having effect from a date earlier than the coming into force of the Government of India Act when legislative powers of the Centre and the Provinces were separately allocated cannot be accepted, because the effect would be not only to stop at the year 1937, but to prohibit retrospective legislation right up to the date of the passing of any new Act, no matter how long after 1937 that may happen. If there are two possible interpretations, it is the duty of a Court to accept that one which is more reasonable, more consistent with ordinary practice and less likely to produce impracticable results. It must, therefore, be held that there is nothing in S. 292, Government of India Act, which debars the Central or a Provincial Legislature, which has altered, repealed or amended a previously existing law, from giving the new provision a retrospective effect from dates earlier than when the Act is passed.

One must not, however, overlook the important provision that the previously existing law must in any case continue in force, until altered, repealed or amended. Unless, therefore, there is an Act which actually alters, repeals, or amends it, that law must, in view of the provisions of S. 292, continue in force and cannot be considered as non-existent. Those provisions not merely preserve such laws but keep them in force until actually altered, repealed or amended.

But it is not absolutely necessary that a statute must be repealed by express language, e. g., shown as repealed in an attached schedule. Repeal, and certainly alteration or amendment, can be effected by necessary implication also. When two Acts are clearly inconsistent with or repugnant to each other, the former will be deemed to have been impliedly repealed or amended, as the last expression of the will of the Legislature must always prevail. But they must really be

irreconcilable with each other. Two negative enactments need not, however, be contradictory. An earlier statute expressed in negative language may be included in or absorbed by a later statute expressed in a similar negative language, but with a wider scope. The former in such a case would not be repealed, nor even necessarily altered by the latter, as they both can stand together, but it can be said to have been amended.

The impugned Act did not in reality repeal, alter or amend the provisions of the law contained in S. 73, Agra Tenancy Act. Indeed, that was repealed subsequently by Act, XVII of 1939. It therefore stood intact in December 1939, by virtue of the provisions of S. 292, Government of India Act. What the impugned Act attempted to do was to widen the scope of S. 74 (1) without embodying anything like the provisions of S. 74 (2), which would have destroyed the right to sue. Section 74 (1) of the old U. P. Act prevented any order, passed under S. 73 from being questioned. The impugned Act attempts to prohibit any order for remission from being questioned, without saying any order, "under" or "in accordance with" S. 73. It follows that without altering the substantive law so as to give a Collector power to order remission of rent exceeding the remission of revenue in proportion, it has merely created a further bar which completely restricts a civil right to challenge it under S. 9, Civil P. C. Whether valid or invalid on any other ground, it cannot be said to offend against the provisions of S. 292, Government of India Act.

List II, Nos. 2 and 21. — While Iqbal Ahmad J., has held that the subject-matter of the impugned Act does not fall within any of the entries in List II or List III of Sch. 7 of the Act, both Bajpai and Ismail JJ. have held that it falls under these two entries.

It is true that the three lists even if taken together may not prove to be absolutely exhaustive. As legislation can cover a very wide range, it is quite possible to conceive of cases which are not comprised in any of the lists. It was with the consciousness of this possibility that provision as to residual power of legislation was made in S. 104 which assumes that there may be a matter with respect to which a law may be enacted, which is not enumerated in the lists of Sch. 7. But the lists are so comprehensive that apart from personal laws it would be only extremely rare cases which would not be covered by them at all.

Entry No. 21 of List II includes 'land, with rights therein, land tenures, including the relation of landlord and tenant, and the collection of rents,' besides other categories. This itself has a wide scope. If the impugned Act were in pith and substance one for remission of rent, it would be impossible to exclude it from this entry. Entry No. 2 of List II includes jurisdiction and powers of all Courts, with respect to any of the matters in that list. Accordingly, entries Nos. 2 and 21 read together would cover any restriction that may be imposed on the jurisdiction and powers of Courts, with respect to land, land tenures, relation of landlord and tenant, and collection of rents. As there is no category in List I or List III which is similar to entry No. 21 of List II, the latter must be given a liberal interpretation so as to invest Provincial Legislature with full power to legislate with respect to them, so long as such legislation does not conflict with any other provision. I am not prepared to hold that entry No. 21 must necessarily be confined to substantive provisions and not to procedural law. Methods of collection of rent may be a matter of procedure and yet fall under this head. Provisions as to registration of leases, functions of special officers in fixing rents and giving of certain notices, may well be procedural and yet fall within this entry. These are but a few instances. On the other hand, legislation, which affects the jurisdiction and powers of civil or revenue Courts, would come under entry No. 2. Legislation affecting procedure in rent and revenue Courts would also fall under the same entry. But mere procedure in civil Courts will be outside those entries, and can only come under entry No. 4 of List III. The result is that if the subject-matter is within entry No. 21, then restriction on jurisdiction and powers of civil and revenue Courts with respect to it would also be within the authority of Provincial Legislatures. If, however, the matter itself is not within List II, then it cannot be brought under entry No. 2 of that List, which in express terms refers only to matters in that List.

Tenancy Law. — The defendants were thekaders, holding under a registered lease of proprietary rights, (including a right to receive rents and profits), from the landholders for a term of years on a fixed annual rent. The word tenant in the Agra Tenancy Act excludes a thekadar, though certain specified provisions relating to tenants, including Ss. 73 and 74, also apply to them.

(See chap. 13, Agra Tenancy Act, 1926). Outside that Act the United Provinces Government had no special power to interfere with the agreement between a landholder and his thekadar. The landholder would be entitled to enforce the liability of the thekadar to pay the rent. There are provisions for enhancement and abatement of rent, subject to certain limitations but with them the Government were not concerned. There was no power given to the Government themselves to order remission of rent in individual cases. Under S. 72, if remission of rent were granted by a Court on account of draught, hail, deposit of sand or other like calamity, then proportionate remission of revenue was to be ordered by the revenue authorities subsequently. Section 73 (1) was intended to cover the converse case. When for any cause the Local Government, or any authority empowered by it, had in the first instance "remitted or suspended" whole or part of revenue, a Collector, or if so empowered by Government, a first class Assistant Collector, might order the remission or suspension of rents to an amount "which shall bear the same proportion to the whole of the rent payable in respect of the land as the revenue of which the payment has been so remitted or suspended." Under sub-s. (2), where revenue has been wholly or partly "released, compounded for or redeemed," remission or suspension of rent could be ordered by such authority and in accordance with such scale as the Local Government may by rule direct. This sub-section did not apply to the case where revenue had been "remitted or suspended." Sub-section (3) made this provision applicable to a thekadar. Section 74 (1) provided that an order "under sub-s. (1) or sub-s. (2) of S. 73" shall not be questioned in any civil or revenue Court. Sub-section (2) provided that a suit shall not lie for the recovery of any rent of which the payment has been remitted or suspended "in accordance with the provisions of S. 73." As already mentioned, the High Court in I L R (1938) ALL 114¹ interpreted these two sections as meaning that a civil suit would be barred only if the order were in accordance with S. 73, that is to say, if the remission ordered by the Collector were in proportion to the remission of the revenue. It further held that the aggrieved landholder could sue for arrears of rent ignoring the order of remission, or pay revenue under protest and sue the Government for refund under S. 183, U. P. Land Revenue Act (3 of 1901).

The impugned Act — If the Provincial

Legislature felt that the sections had been wrongly interpreted by the High Court, it was open to it to pass a declaratory or explanatory Act, to make its intention clear. Such a legislation would, of course, have been retrospective in nature, and would have nullified the effect of the High Court's ruling. No such course was followed and instead the impugned Act (U. P. Act 14 of 1938) was passed. The Preamble stated its object to be to "regularize" the remissions of rent made "before" the passing of that Act, which meant that certain orders already passed, which might have been irregular, were to be made regular by this Act. But in fact the provisions of S. 2 on the one hand fall short of the object by not attempting to validate any invalid orders that might have been passed before, and on the other hand they go beyond the Preamble by making orders passed even after the Act equally unquestionable. They are in the following terms :

Notwithstanding anything in the Agra Tenancy Act, 1926, where rent has been remitted on account of any fall in the price of agricultural produce which took place before the commencement of this Act, under the order of the Provincial Government or any authority empowered by it in that behalf, such order, whether passed before or after the commencement of this Act, shall not be called in question in any civil or revenue Court.

There are two provisos, the first limiting the amount to what may be ordered in the agricultural year in which the Act comes into force, and the other to the period of the settlement. The Act was to come into force when notified.

Interpretation — The intention of the Legislature has to be gathered from the language actually employed in the Act. For statutes which confer or take away legal rights, whether public or private, or alter the jurisdiction of Courts of law, express and unambiguous words are necessary. No loopholes should be left for escape. The order of remission dealt with by the U. P. Act is not one necessarily within the four corners of S. 73, nor is there any specific reference to that section. The language actually used can suggest that the section was intended to prevent the order of the Provincial Government, or any authority empowered by it in that behalf, from being questioned. In the main section, the word order is used only when referring to "the order of the Provincial Government or any authority empowered by it in that behalf". This is followed immediately by the words "such order etc.". The word "such" ordinarily

means 'aforementioned'. The normal construction of the section would then imply that such order of the Provincial Government, or any authority empowered by it in that behalf, shall not be called in question.

A reference to S. 73, sub-s. (2) shows that where revenue has been "released, compounded for or redeemed" (and not 'remitted' or 'suspended' as under sub-s. (1)) the local Government can nominate an authority and make a rule fixing a scale according to which remission or suspension of rent may be ordered. The Government had no power whatsoever to fix any scale for remission or suspension of rent where revenue had been "remitted or suspended" under sub-s. (1). Nor can it itself make any order of remissions; it is the Collector who does so in each case under the statutory authority conferred on him by sub-s. (1). The Government can empower an Assistant Collector of the first-class to act instead of the Collector, but the order of remission made by him also will not be "under the order of the Provincial Government" but under S. 73 (1). It is probable that in issuing the notification containing a scale of remissions the distinction between the two sub-sections was overlooked. At any rate for over seven years no attempt was made to approach the Legislature to validate such action. Similarly, when the bill was introduced, it was assumed that the Provincial Government itself could order remissions, and it was on that assumption that the Legislature proceeded to enact that such an order should not be questioned. The words "under the order of the Provincial Government" have no meaning so far as S. 73 (1) is concerned. On this interpretation, the section would be wholly ineffectual, because in a suit for arrears of rent the landholder is not challenging the scale which the local Government was pleased to lay down, amounting at best to instructions to Collectors, but is challenging the order of the Collector or the Assistant Collector, passed under statutory authority, on the ground that it was not in accordance with S. 73, his suit not being barred under S. 74.

A majority of the learned Judges of the High Court have expressed the opinion that the real object of the U. P. Act was not what it purports to suggest. Iqbal Ahmad J., has remarked :

Here again the substance of the section, apart from its form, is to regularize and validate irregular and invalid orders as to remissions of rent passed by the provincial executive. There is, therefore, no escape from the conclusion that by the impugned Act, validity is given to wholly arbitrary and invalid

orders already passed or to be passed in future by the executive authorities.

He has again remarked :

Now a scrutiny of the impugned Act as a whole leads to the irresistible conclusion that it was designed to, and does in substance, though not in form, validate the invalid orders as to remissions passed by the provincial executive In short the impugned Act, though disguised as an enactment regulating procedure, is, in fact and substance, an enactment regularizing illegal executive orders. It is a disguised and colourable legislation intended to serve the purpose indicated above, and this is not permissible.

Bajpai J. has said :

The Act pretends to deal with procedure only for it attempts to regularize the remissions of rent and says that certain orders of the Provincial Government shall not be called in question in any civil or revenue Court, but this is only a masquerade and the real purport of the Act is to take away the rights of the landlords which were contained in Ss. 73 and 74, *Agra Tenancy Act*, as interpreted by this Court in *I L R (1938) All 114*.¹ I therefore feel inclined to hold that the Act does not deal merely with matters of procedure but deals with substantive rights as well.

Ismail J., has not expressed any such opinion.

Past orders — As regards past orders, S. 2 does not contain any substantive provision which would even imply that the orders were in fact valid or were being made valid. Nor is there any mention that the liability of the tenant to pay the rent remitted has ceased, and the right of the landholder to realize it has been extinguished. It merely attempts to create a bar against the question being agitated in a civil or revenue Court. This is quite a different thing from a substantive provision validating any order that might have been passed in contravention of the provisions of S. 73, *Agra Tenancy Act*. The opening words "Notwithstanding anything in the *Agra Tenancy Act, 1926*" do not amount to an alteration, repeal or modification of S. 73 of that Act. Indeed, not only was S. 73 not mentioned in this Act as having been repealed by it, but was actually repealed later by Act 17 of 1938, which came into force in December of that year. It is possible to conceive of cases, for example, where the whole rent has been paid with mutual consent, where the landholder would not stand in need of suing for it, so as to be compelled to call in question the order of remission. His right has not been extinguished, only his remedy in a Court of law is barred. The essence of the landholders' grievance is that the Government made them give up their rents in part without in their own turn making compensation to them by giving up a proportionate amount of the revenue. The alleged illegality of the

order of remission arises from the circumstances that the Provincial Legislature prevents them from challenging the illegal action of the Government.

Future orders.—The limit to which the past orders of remission had gone was perfectly known. But as regards future orders, the scope of S. 2 is very wide. The Government could up to June 1939 (and later if the notification were delayed) issue any order of remissions that it chose. Such an order would be operative irrespective of the extent of the remission, even up to the remission of the entire rent, irrespective of the period of remission, as it can be continued even up to the expiry of the settlement, and also irrespective of the amount of remission of revenue, even to the extent of there being no remission of revenue at all. If it is a valid Act, it enabled the Provincial Government to issue an order directing Collectors to remit to all the tenants the whole of the rents for the entire province for the remainder of the period of the settlement, while not remitting any revenue at all. This would mean that landholders would be compelled to pay revenue to Government, although they would be prevented from realizing any rents at all from their tenants. For all practical purposes, this would amount to an extinction of the relation of landlord and tenant for the time being. Such a measure is highly inconceivable, and yet it is not beyond all possibility that a Government, bent on abolishing zamindari rights, may resort to it under the authority of this section. In spite of the confiscatory powers exercised by the Government, no remedy, whatsoever would be open to the aggrieved landholders in any civil or revenue Court to which alone they can have recourse. This section would therefore invest the Provincial Government with full powers to do what they like, no matter to what extent the contract between a landholder and his lessee is disturbed. Such a drastic interference may well infringe the proprietary rights possessed by landholders, and may also in an extreme case amount to a flagrant breach of the agreement entered into by the Government at the time of the settlement for its duration. Of course, no Act can be invalidated on the mere ground that it may possibly be abused; but in order to see in which list it falls, its provisions have to be examined in their full scope.

"With respect to"—The crucial point in this appeal is whether this section can be held to be "with respect to" any of the

matters mentioned in entry No. 21 of List II, in particular, land, relation of landlord and tenant, and collection of rents. The words "with respect to" are not necessarily the exact equivalent of 'relating to' or 'connected with'. These words may not include a case where the subject of legislation is only remotely related or very indirectly connected with the matters mentioned in the categories. An Act may principally be with respect to some other subject and yet it may incidentally relate to one under consideration. The mere fact that there is a slight, remote or indirect relation or connexion, would not be sufficient to answer in the affirmative the question whether it is with respect to such subject. It is not enough that it should in its working somehow overreach that subject. It has to be seen whether it appertains to such matters substantially and directly, and not only whether it would in actual operation affect any such matters in an indirect way. Again, a provision of law may be partly in one category and partly outside it. The mere fact that it is partly in that category would not suffice for making it valid if it is ultra vires with regard to the other portion. When the question is whether any impugned Act is within any of the three lists, or in none at all, it is the duty of Courts to consider the Act as a whole, and decide whether in pith and substance the Act is with respect to particular categories or not. This can be inferred only from the design and purport of the Act as disclosed by its language and the effect which it would have in its actual operation.

Their Lordships of the Privy Council have repeatedly stressed the fact that we must look to the pith and substance of the Act in order to ascertain its true nature and character. As laid down in (1882) 7 A C 829,¹²

the true nature and character of the legislation in the particular instance under discussion must always be determined, in order to ascertain the class of subject to which it really belongs.

In (1937) A C 355¹³ at p. 367, Lord Atkin laid down :

In other words, Dominion legislation, even though it deals with Dominion property, may yet be so framed as to invade rights within the province, or encroach upon the classes of subjects which are reserved to provincial competence. It is not necessary that it should be a colourable device,

12. (1882) 7 A C 829 : 51 L J P C 77: 46 L T 889, *Russel v. Reg.*

13. ('37) 24 A I R 1937 PC 89: 168 I C 316: (1937) A C 355 : 106 L J P C 37 : 156 L T 307 : 81 S J 215 : 53 T L R 332 (P O), *Attorney-General for Canada v. Attorney-General for Ontario.*

or a pretence. If on the true view of the legislation it is found that in reality in pith and substance the legislation invades civil rights within the province, or in respect of other classes of subjects otherwise encroaches upon the provincial field, the legislation will be invalid.

As it was found that the impugned Act was in pith and substance an Insurance Act, affecting the civil rights of employers and employed, it was held to be ultra vires. In (1937) A C 368,¹⁴ Lord Atkin, after pointing out the limitation on the plenary power of the Dominion that Parliament "shall not in the guise of enacting criminal legislation in truth and in substance encroach on any of the classes of subjects enumerated in S. 92", though there would be no objection if there were a genuine attempt to amend the criminal law, remarked:

In the present case there seems to be no reason for supposing that the Dominion are using the criminal law as a pretence or pretext, or that the Legislature is in pith and substance only interfering with civil rights in the province.

In (1937) A C 377¹⁵ at p. 389, Lord Atkin after agreeing with the view that the sections said to be severable were in fact incidental and ancillary to the main legislation, remarked:

As the main legislation is invalid as being in pith and substance an encroachment upon the provincial rights the section referred to must fall with it as being in part merely ancillary to it.

In (1938) A C 708,¹⁶ Lord Atkin's remark was quoted: "It is well established that you are to look at the 'true nature and character of the legislation,' (1882) 7 A C 829,¹² 'the pith and substance of the legislation'." See also (1939) F C R 18 at p. 95=(1938) 2 F L J 6¹⁷ at p. 65.

Section 2—The question raised in I L R (1938) ALL 114¹ was not a constitutional one, but merely turned on an interpretation of Ss. 73 and 74 of the old Agra Tenancy Act. Its soundness has not been questioned before us, and I can only assume that the previous order of remission of rent as held therein was ultra vires and illegal. Had the previous order of remission of rent been merely

14. ('37) 24 A I R 1937 P C 91: 168 I C 56 : (1937) A C 368 : 106 L J P C 34 : 156 L T 303 : 81 S J 255 : 53 T L R 340 (P C), Attorney-General for British Columbia v. Attorney-General for Canada.

15. ('37) 24 A I R 1937 P C 93 : 168 I C 10 : 1937 A C 377 : 106 L J P C 64 : 81 S J 235 : 53 T L R 330, Attorney-General for British Columbia v. Attorney-General for Canada.

16. ('39) 26 A I R 1939 P C 36 : 180 I C 538 : (1938) A C 708 : 107 L J P C 115 : 82 S J 728 : 54 T L R 1090 (P C), Shannon v. Lower Mainland Dairy Products Board.

17. ('39) 26 A I R 1939 F C 1 : 180 I C 161 : 1939 F C R 18 : (1938) 2 F L J 6 : I L R (1939) Kar F C 6 (F C), In the matter of C. P. & Berar Sales of Motor Spirit & Lubricants Taxation Act, 1938.

irregular, as not being in strict conformity with the existing law, but without any absence of jurisdiction in the authority issuing it, for instance when some mistake in the calculation of the ratio is made or there has been any other defect of procedure, then S. 2 of the impugned Act would certainly be with respect to "the collection of rents," so far as such orders are concerned, and it would be intra vires.

If the order of remission, which the impugned Act attempts to make unquestionable, was in fact wholly ultra vires and totally void, issued by an authority not at all competent to do so, with a view not only to benefit the tenants but also to protect Government officers against any suit for damages that may be brought on account of their illegal orders, or protect the Government in a suit brought against it under S. 183, U. P. Land Revenue Act, (3 of 1926), (assuming that the suggestion made in I L R (1938) ALL 114¹ was correct), then the U. P. Act which merely prevents such an order from being questioned in a civil or revenue Court, would not be so much with respect to "collection of rents," as with respect to "validating void orders." There is a clear distinction between challenging the legality of an order in the sense that for non-compliance with certain provisions of law it is invalid or ineffective, and challenging the authority, power or jurisdiction of the person or body, who issued that order. In the latter case the challenge is much more than merely calling in question the order itself. It is an assertion that the act of that authority or body was itself a nullity and no more binding than the act of a man in the street. If the U. P. Act, which obviously falls short of validating previous illegal and void orders, is principally for preventing illegal orders, from being called in question, then it is more substantially with respect to validating such illegal orders than with respect to the matter to which those orders had originally related. In such a case it would not fall solely within the categories "relation of landlord and tenant" or "collection of rent."

Furthermore, the impugned Act is not confined to the orders of remission previously passed, but goes further and provides that even all future orders of remission, regardless of the fact whether they are or not authorized by any law or are contrary to any existing laws, shall be unquestionable. This is inextricably interwoven into the whole scheme so as not to be

separable. The whole purport of the Act is indirectly to invest the Provincial Government with very extensive powers to pass any order of remission which it chooses to do even to the extent of stopping all payments of rents. It thus confers in an indirect way a wide power on the Government or authority empowered by it to pass in the future even arbitrary orders for remission, with or without authority, in utter disregard of the existing legislation. If a Legislature cannot itself enact a wholesale deprivation of legal rights, then, it cannot by enactment adopt the device of appointing an authority invested with such powers. What the Legislature cannot do directly, it cannot do indirectly : (1921) 2 A C 91.¹⁸ But if it can so enact then the possibility of the power being abused in future cannot invalidate the Act : see 1939 F C R 18.¹⁷ It seems to me that S. 2 goes beyond the subject of remission of rents. In pith and substance, it is an Act not only with respect to "the relation of landlord and tenant" or the "collection of rents," but is also with respect to conferring on the Provincial Government very extensive powers of interference with the legal rights of landholders in their lands. But the category of "land" in entry No. 21 of List II includes 'rights in and over land,' and is also within the exclusive authority of the Provincial Legislature. Even if by any chance the impugned Act were indirectly with respect to assessment of revenue, it will fall within entry No. 39, and be still in List II. We are not concerned with any unfairness or injustice of the legislation, nor with any injury that may be caused to private rights so long as there is authority to pass it. The only protection available, even though of a limited character, is that contained in S. 299 (3), Government of India Act, requiring a previous sanction of the Governor, and if that is gone then a representation that assent should be withheld. It would be too late to object afterwards. The want of a previous sanction of the Governor in the present case is cured by the assent given to the Act subsequently. In view of the fresh tenancy legislation that came into effect in the United Provinces later, the present case is probably the last pending case in which this difficult point has to be decided.

Pending action — The learned advocate for the plaintiffs has in the last resort

18. (1921) 8 AIR 1921 P C 148 : (1921) 2 A C 91 : 90 L J P C 102 : 125 L T 136 : 37 T L R 436, *Great West. Saddlery Co. v. Reg.*

1941 F.O./5b, 6 & 7a

sought to support the decree of the High Court on the ground that the impugned Act did not apply to the pending action at all. Unfortunately, this point was not raised or argued before the High Court, nor is this a constitutional question. But, if we overrule the High Court, we cannot direct it to modify its decree in the light of that Act without disposing of this plea. In that case we must either ask the High Court to do so, or decide the point ourselves.

Undoubtedly, an Act may in its operation be retrospective, and yet the extent of its retrospective character need not extend so far as to affect pending suits. Courts have undoubtedly leaned very strongly against applying a new Act to a pending action, when the language of the statute does not compel them to do so. It is a well recognized rule that statutes should, as far as possible be so interpreted, as not to affect vested rights adversely, particularly when they are being litigated. When a statute deprives a person of his right to sue or affects the power or jurisdiction of a Court in enforcing the law as it stands, its retrospective character must be clearly expressed. Ambiguities in it should not be removed by Courts, nor gaps filled up in order to widen its applicability. It is a well established principle that such statutes must be construed strictly, and not given a liberal interpretation.

In (1848) 2 Ex 22,¹⁹ a new Act (Gaming Act, 1845), which was passed while an action was pending, was held not to be retrospective in its effect so as to defeat that action, even though S. 18 had said, "no suit shall be brought or maintained for recovering money etc." The alternative "or maintained" would ordinarily have been held to be applicable to a pending suit. Nevertheless, Parke, B. remarked :

It seems a strong thing to hold that the Legislature could have meant that a party who under a contract made prior to the Act had as perfect a title to recover a sum of money as he had to any of his personal property, should be totally deprived of it without compensation.

Similarly, in (1909) 1 K B 310,²⁰ S. 4, Trade Disputes Act, 1906, was interpreted as not preventing a Court from disposing of an action begun before the passing of that Act, although S. 4 had enacted : "an action for tort against a trade union shall not be entertained by any Court." Again in (1922) 39

19. (1848) 2 Ex 22 : 12 Jur 138 : 76 R R 479, *Moon v. Durden.*

20. (1909) 1 K B 310 : 78 L J K B 259 : 100 L T 172 : 25 T L R 205, *Smithies v. National Union of Operative Plasterers.*

T L R 128,²¹ the Gaming Act, 1922, which had repealed a section of an earlier Gaming Act, was held by the Court of Appeal not to operate to put an end to the pending action, even though it had enacted that "no action for the recovery of money under the said section shall be entertained by any Court." In (1923) 2 K B 193,²² the Court went further and held that the Gaming Act of 1922 did not prevent the bringing of an action under the repealed section of the older Act, even after the date when the Repealing Act came into force in respect of a cause of action which had arisen before that date. In (1862) 31 L J Ex 230,²³ followed in subsequent cases, it was held that s. 32, Medical Act, 1858, (C. 90) did not apply to an action for medical services begun before that date, but tried after it, although the section had enacted that no person should after 1st January 1859, recover any charge for medical treatment unless he shall prove at the trial that he was on the Medical Register. The case in (1905) A C 369²⁴ was pending when the Commonwealth of Australia Constitution Act, 1900, came into force, under s. 73 of which a decision of a Court of any State, from which an appeal would have previously lain to the Queen in Council, became appealable only to the High Court. At p. 372, Lord Macnaghten, while considering whether an appeal lay to the Privy Council, laid down the general principles applicable to the retrospective character of a legislation and remarked :

On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment.

It was further remarked :

In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested.

This view was of course followed by a Full Bench of the Allahabad High Court in

21. (1922) 39 T L R 128, *Beadling v. Goll*.
22. (1923) 2 K B 193 : 92 L J K B 866 : 129 L T 443 : 67 S J 537 : 39 T L R 409, *Henshall v. Porter*.
23. (1862) 31 L J Ex 230, *Thistleton v. Frewer*.
24. (1905) A C 369 : 92 L T 788 : 74 L J P O 77 : 21 T L R 518, *Colonial Sugar Refining Co. v. Irving*.

50 ALL 965.²⁵ In 49 Cal 820,²⁶ their Lordships had to consider the effect of the Mussalman Wakf Validating Act, (6 of 1913) of which the Preamble had expressly stated :

Whereas doubts have arisen regarding the validity of wakfs created by persons professing the Mussalman faith ; and whereas it is expedient to remove such doubts.

Section 3 said : "It shall be lawful to create a wakf, etc." ; and s. 4 said : No such wakf shall be deemed to be invalid, etc." Their Lordships held that the Act could not be construed as validating deeds executed before its date. In this case the Act had been passed even before the suit had commenced. No doubt in 1939 F C R 193,²⁷ this Court applied a new Bihar Money-lenders Act (7 of 1939) which came into force after the filing of the appeal. But s. 13 expressly said : "When an application is made before or after the commencement of this Act, etc." Since then s. 7 of the new Act has been consistently applied in all the Bihar cases, even in suits pending in appeal. But here again s. 7 contains the words,

in any suit brought by a money-lender before or after the commencement of this Act in respect of a loan advanced before or after the commencement of this Act or in any appeal or proceedings in revision arising out of such suit,

which in express terms refer to a pending suit. In *Mukherjee v. Mst. Ram Ratan Kuer*²⁸ the new Bihar Act had express words to the effect that all transactions from 1910 shall be deemed to be valid, which if applicable to the appeal would take away the appellant's right altogether. Their Lordships held that in view of that enactment the appeal should not be allowed. In (1882) 9 Q B D 672,²⁹ a new Act had come into force, s. 14 of which made the section applicable to old leases as well, and which clearly deprived the landlord of a right to claim forfeiture. In that case the landlord had not till then re-entered. The Court of appeal applied the new Act on the ground that appeals had the character of rehearing and the appellate Court could make such order as ought to be made according to the state of things at that time.

25. ('28) 15 AIR 1928 All 437 : 111 I C 6 : 50 All 965 : 26 A L J 998 (F B), *Ram Singha v. Shankar Dayal*.

26. ('22) 9 AIR 1922 PC 107 : 69 I C 138 : 49 Cal 820 : 49 I A 153 (P C), *Suleman Quadir v. Salimullah Bahadur*.

27. ('39) 26 AIR 1939 F C 74 : 182 I C 161 : 1939 F C R 193 : ILR (1939) Kar F C 165 (F O), *Shyamkant Lal v. Rambhajan Singh*.

28. ('86) 23 A I R 1936 P C 49 : 160 I C 105 : 15 Pat 268 : 63 I A 47 (P C).

29. (1882) 9 Q B D 672 : 52 L J Q B 44 : 31 W R 75, *Quilter v. Mapleson*.

As already mentioned, the landholders in the present case ignoring the order of remission had claimed the full amount of the arrears of rent from the very beginning. Even in the second appeal before the High Court, they had challenged the order of remissions of rent in grounds Nos. 2, 3 and 6 of their memorandum of appeal, several years before the impugned Act came into force. They had already called the previous order in question, and that plea was already before the High Court for consideration. The Legislature was presumably aware of the previous decision in ILR (1938) ALL 114¹ and must also have been aware that numerous other suits for arrears of rent must be pending. And yet no express words were put in the impugned Act to show that it should apply to all actions pending in appeal. Further, the provisions that no such order shall be called in question has a certain amount of ambiguity in it and leaves it doubtful whether only the parties are prevented from questioning the order or even the Court is debarred from ignoring it as having been issued by an unauthorized body, and enforcing the law that has not been repealed or amended by the U. P. Act. Of course, no such bar would exist against the Federal Court; but in declaring what decree should be passed by the High Court it cannot ignore such a bar if it exists. In view of the trend of judicial decisions already referred to, I am of the opinion that the impugned Act was not applicable to the appeal pending before the High Court. The decree of the High Court must therefore stand and this appeal should be dismissed.

Varadachariar J. — The constitutional question arising for decision in this appeal relates to the validity of the Regularisation of Remissions Act (14 of 1938) passed by the Legislature of the United Provinces. A Full Bench of the Allahabad High Court held the Act to be ultra vires that Legislature. All the three learned Judges who constituted the Full Bench were of the opinion that as the Act attempted to legislate with respect to a period anterior to the date of its enactment, a period during which another valid Act was in force, it contravened the provisions of S. 292, Constitution Act. One of the learned Judges (Iqbal Ahmad J.) based his conclusion on an additional ground viz., that the impugned legislation was not one made "with respect to any of the matters enumerated in List II" of Sch. 7 to the Constitution Act nor even one with respect to one of those enumerated in the List III.

The circumstances that led up to the impugned legislation and to the attack on its legality have been stated in the judgments just delivered. Reference has also there been made to the stage at which the Government of the United Provinces came to be impleaded as a party to this litigation and to the fact that this appeal has been preferred not by the original defendant but by the Government of the United Provinces.

At the hearing of this appeal, the learned counsel for the plaintiffs-respondents took a preliminary objection to the maintainability of the appeal by the Government of the United Provinces. He contended that there was no decree in this case against that Government, that the Government was not aggrieved or affected by the decree of the High Court and that it accordingly had no locus standi to prefer the appeal. Though S. 205, Constitution Act, provides in general terms that "any party" in the case may appeal to the Federal Court, the learned counsel maintained that these general words must be limited in the manner in which S. 96, Civil P. C., has been limited, and he argued that the mere fact that the United Provinces Government had been formally impleaded as a party in the second appeal would not give it a right to appeal to this Court. He further said that where a person who ought not to have been impleaded had been improperly added as a party by the Court, such person should not be regarded as a party competent to prefer an appeal and he insisted that on the admitted facts of the case the order of the High Court impleading the United Provinces Government as a party to the second appeal should be held to be unwarranted and without jurisdiction. In support of his contention that the United Provinces Government should not have been added as a party, he relied on the observations of a learned Judge of the Madras High Court in 50 Mad 34,² and of the Court of appeal in England in (1892) 1 Ch 487.³⁰ He invited attention to the fact that even the allegations made in support of the petition filed in the High Court to join the United Provinces Government as a party did not attempt to bring the case within O. 1, R. 10, Civil P. C., or suggest that the Government was at least a "proper" (if not "necessary") party to the proceeding and he contended that the alleged desire or intention of the Government to take the case on appeal to the Federal Court which

30. (1892) 1 Ch 487; 61 L J Ch 319; 66 L T 570; 40 W R 520, Moser v. Moreden.

was all that was set out in the petition was no ground for impleading it as a party. The learned Advocate-General of the United Provinces relied on the circumstance that his petition was not opposed before the High Court; to this, the learned counsel for the plaintiffs replied that even if the absence of opposition should be held to amount to consent, such consent could not cure a defect of jurisdiction and that such consent would not in any event give the United Provinces Government a right of appeal which it did not otherwise possess.

I am free to admit the force of some of these contentions. The circumstance that some of the observations in 50 Mad 34,² have been doubted by another learned Judge of the same Court in A I R 1929 Mad 443³ does not seem to me to carry Dr. Asthana very far. Again, it is true that in 55 ALL 825,⁴ the Court observed that the power to add parties had not always been limited to cases falling within the language of O. 1, R. 10, Civil P. C.; but an examination of the facts of that case and of the decisions referred to in that judgment will show that in these cases, the person added was not really a third party but one who on some recognized principle would be bound by the result of the litigation. In (1892) 1 Ch 487,⁵ the Court of appeal (in reversal of the trial Court's order) dismissed the application of the third party, even while recognizing that that party might be "indirectly" affected by the result of the case. The allegation made in support of the petition in that case was that the defendant on record "will not contest the case properly" and yet Kay L. J. was content to answer "we cannot help that." It however appears to me that in a case like the present, it will not be right to regard the state as standing for all purposes on the same footing as a private third party. Its character as the guardian of the public interests cannot be ignored and it will not be right to limit its interest in a litigation strictly to cases in which its pecuniary or proprietary interests or the interests of the public revenue are involved.

In most of the Indian decisions bearing on the question of joinder of parties, the discussion has had to proceed within the limits imposed by the language of the relevant statutory provisions which were in the main intended to deal with private parties. The position of the King as *parens patriæ* has long been recognized in this country; but the extent to which the King's law officer is entitled to initiate or intervene in pro-

ceedings in Courts "to see that justice is done to every part of the King's subjects" (as it is expressed in the old English authorities) has never been clearly or sufficiently defined. As early as in 53 Geo. III, Chap. 155, provision was made authorizing the Advocate-General in this country to take such proceedings as His Majesty's Attorney-General may take in the Courts of Equity in England (S. 111). This section was at one time interpreted by the Supreme Court in Madras as authorizing the Advocate-General to represent the Crown only in cases involving the pecuniary interests of the Crown. But this narrow interpretation was not endorsed by the Judicial Committee: see 4 M I A 190,³¹ a case relating to a charity. The section was reproduced in successive Government of India Acts up to 1919 (see S. 114, Government of India Act of 1919); but in the Act of 1935 neither S. 16 nor S. 55 follows the same lines. Barring ss. 91 and 92, Civil P. C. of 1908 relating to public nuisances and charities and special provisions like S. 26, Patents and Designs Act, 1911, and S. 39, Lunacy Act, 1912, there are at present no specific provisions in the Indian statute book empowering the Advocate-General to institute or intervene in any proceedings in the civil Courts. And it cannot even be said that a well-defined course of practice has grown up as to the cases or circumstances in which the Advocate-General is entitled to intervene or to be impleaded as a party, apart from his representing the Crown or the Secretary of State in suits in which either the Crown or the Secretary of State happens to be a party. Even in England, the distinction between cases in which the Attorney-General figures as a party and cases in which he only intervenes or is merely heard does not appear to be very clearly marked.

The Indian Procedure Code does not contemplate the Advocate-General "intervening" without himself or the Secretary of State being a party to the suit. The result is that even in proceedings similar to those in which the Attorney-General will merely intervene, according to the English or the Dominion practice, the same result has to be attained in this country by impleading the Government as a party. The new Constitution Act (taken with the adaptation of S. 79, Civil P. C.) has introduced a further complication as a result of the provision that in suits by or against the Crown, the Governor-General should be named as the

31. (1846-51) 4 M I A 190 : 6 Moo P C 12 : 1 Sar 395 (P C), Attorney-General v. Brodie.

plaintiff or the defendant in certain cases, that in certain other cases the provinces should be so named, and that in a third group of cases the Secretary of State's name should be stated. But in whatever form the cause title may run, the theory is that the Crown is the party. It may be added that even when the Attorney-General figures as the party in England the theory is that the Crown is a party to the litigation through him : see (1891) 2 Q B 100³² at page 106 and (1874) 18 Eq 172³³ at page 176. Such being the state of the law and of precedents as to the position of the Government in this country or the Advocate-General in relation to proceedings in Courts, it seems to me that when a question like the present one is raised, it must be decided on broad grounds of justice and convenience and not merely turning on the interpretation of a particular rule in the Civil Procedure Code.

If the practice in England is to be treated as affording any guidance here, it may be useful to refer to two instances. In (1899) 1 Ch 494,³⁴ the Court of appeal directed the Attorney-General to be added as a party defendant to an action in which certain plaintiffs sued on behalf of themselves and of other growers of fruit, flowers, vegetables, etc., to enforce certain preferential rights to stand in the Covent Garden market. The Lord of the market was the sole original defendant. The action did not relate to a charity nor did it arise out of a public nuisance. The Court of appeal nevertheless held that the Attorney-General must be before the Court "to represent the public as against the alleged preferential rights of the growers." This direction was referred to with approval by the Judicial Committee in (1920) A C 358³⁵ and (1921) 2 Ch 533.³⁶ P. O. Lawrence J. directed the addition of the Attorney-General as a party to a proceeding in which the point for decision was whether a tenant for life had forfeited his interests under a particular settlement by reason of his having become a "German National" within the meaning of the Peace Treaty Order of 1919. The tenant for life objected to the addition of the Attorney-General, but the learned Judge overruled the objection, not merely on the ground that the inter-

pretation of the treaty was a matter which concerned the Crown but also on the ground that the question raised was one "which may affect a large section of the British public."

I find it difficult to say whether and if so how the same course could have been adopted by a Court governed by the Civil Procedure Code in this country and whether according to the processual law obtaining in this country the Government or the Advocate-General will be the proper party to be impleaded, if the principle of the above decision is to be followed here. A decision of a learned Judge of the Calcutta High Court seems apposite here. In 58 Cal 801,³⁶ the Advocate-General sought to intervene on behalf of the Secretary of State in a succession certificate proceeding with a view to contend that the High Court on its original side could only grant letters of administration but not a succession certificate. It is possible to suggest that the interests of Government revenue were concerned here, because on the issue of letters of administration succession duty might be payable on the whole estate whereas a succession certificate could be limited to particular debts and the duty payable to Government correspondingly reduced. But the learned Judge (Remfry J.) did not merely hear the Advocate-General on the question of jurisdiction or court-fee, but added the Secretary of State as a party. The very circumstance that in the present case the High Court thought it proper to issue notice to the Provincial Government involves a recognition of the fact that the Government was interested in the question raised — presumably as representing the large class of subjects for whose benefit the Act was intended—though its interest may be limited to the general question, viz., the validity of the enactment. There was also the fact that the remission whose legality was in question had been granted under the orders of the Provincial Government.

It is not however necessary for me to consider at this stage what this Court should do if it had in the first instance to deal with the application made by the United Provinces Government to the High Court in this case; nor does it seem to me useful to speculate what the High Court itself would have done if the application of the United Provinces Government to be joined as a party

32. (1891) 2 Q B 100 : 65 L T 162 : 55 J P 615, Attorney-General v. Logan.

33. (1874) 18 Eq 172 : 44 L J Ch 118 : 30 L T 590 : 22 W R 619, Attorney-General v. Cocker-mouth Local Board.

34. (1899) 1 Ch 494, Ellis v. Duke of Bedford.

35. (1921) 2 Ch 533 : 66 S J 687 : 91 L J Ch 34 : 37 T L R 966, In re Chamberlain's Settlement.

36. ('31) 18 AIR 1931 Cal 580 : 134 I C 1279 : 58 Cal 801 : 35 C W N 122, In the goods of Bhola-nath Pal.

had been opposed by the plaintiffs. I am not prepared to go so far as to ignore the fact that the High Court has impleaded the United Provinces Government and that this course has been adopted with the consent (express or implied) of the plaintiffs. In my opinion, there is no case here of a defect of jurisdiction in the sense in which it is said that consent cannot cure a defect of jurisdiction. It is true that in, (1892) 1 Ch 487³⁰ Lindley L. J. observed that the question was not one of "discretion but of jurisdiction". But as the antithesis shows, the learned L. J. apparently had in mind the difference between the decision of the question of joinder on the interpretation of a rule of law and a direction given by the lower court in the exercise of its discretion, because in the latter case the Court of appeal would generally be reluctant to interfere. It may even be regarded as a case of excess of jurisdiction within the meaning of s. 115, Civil P. C., but that will not make the order void in the sense that it may be ignored or treated as if it had never been passed. In 50 Mad 34,¹ the learned Judge intimated that but for the opposition of the plaintiff he might have directed the addition of the Secretary of State as a party.

To the suggestion that the expression "any party" in s. 205 (2), Constitution Act, must be limited on the lines on which the generality of the language of s. 96, Civil P. C., has been limited by decisions, the answer is furnished by the difference in language between the two provisions. Section 96, Civil P. C., does not in terms say who is entitled to prefer an appeal. But according to the Code it is the "decree" that has to be appealed against. The decisions have therefore laid it down as a matter of inference that a party adversely affected by the decree is the only person entitled to appeal. It was however realised that a rule so limited might cause hardship in some cases. An extension was therefore made by conceding a right of appeal to a party who might be bound by a finding in the judgment, though there was no decree against him: see the cases reviewed in 62 Cal 701.³⁷ Section 205, Constitution Act, provides for an appeal "from any judgment, decree or final order"—an expression which has received varying interpretations—and sub-s. (2) of the section enacts that "any party in the case may appeal". Why should this express provision be qualified by adding the words if adversely

affected by the decree? It may be taken as a matter of "common sense that there can and will be no appeal when there is nothing to appeal about": see 9 C W N 584³⁸ at p. 588. But why limit the grievance to a grievance about the decree? Even on the footing that the general language of s. 205 (2) may or must be limited in some manner, it seems to me that its scope ought not to be unduly narrowed so far as the Government (whether Central or Provincial) in this country is concerned. The section is principally concerned with the determination of constitutional questions though arising in a litigation between private parties. The Government stands in a peculiar situation: it has no doubt pecuniary or proprietary interests in one sense, but in another aspect it is also the custodian and the protector of the interests of the public; and the question of the legality of a statute is one in which it has a special interest.

It is in view of this consideration that this Court has in O. 36 of its Rules provided for notice of any proceedings being given to the Advocate-General of India or to the Advocates-General of the Provinces and for applications being made by them to be heard in any proceedings before this Court. Both on principle and as a matter of expediency, it seems to me very undesirable to place the Government in this embarrassing position, that while it must deem itself bound by an opinion expressed by the High Court as to the invalidity of a statute, it must find ways of persuading private parties formally to file an appeal, if it desires to have the constitutional question brought up before this Court. The procedure under s. 213, Constitution Act, may not be found appropriate when the question of the legality of a statute has actually been put in issue before a Court of law in a litigation between private parties.

I have already stated that the Indian Civil Procedure Code does not contemplate an "intervention" by the Advocate-General as distinguished from an addition of the Advocate-General or the Government as a party. When either of them has been impleaded as a party with a view to give them a hearing, it seems to me that the Court would fail to give full effect to the language of s. 205 (2), Constitution Act, if it should hold that notwithstanding such joinder as a party, the Advocate-General or the Government had no right to prefer an appeal. In proceedings relating to charities, it has

37. ('35) 62 Cal 701 : 163 IC 75; 61 C L J 353 : 39 C W N 567; *Harachandra Das v. Bholanath Das*.

38. ('05) 9 C W N 584, *Krishna Chandra Goldar v. Mohesh Chandra Saha*.

been held that where the Advocate-General is a party, he is the proper person to appeal against an adverse judgment: see 32 Bom 155³⁹ following (1841) 3 Beav 447,⁴⁰; (see also 1 L R (1937) Bom 425⁴¹) where the learned Judges took the additional ground that the beneficiary, though he was heard by counsel, was not to be treated as a party. I see no reason why the principle should be different in a case like the present. Neither in the one case nor in the other has the Advocate-General or the Crown or the State any pecuniary or proprietary interest if that is to be the sole test. The right of appeal being a creature of the statute, the right of one who is within the terms of the statute cannot, it seems to me, reasonably be denied when even on the broader ground of interest in the litigation, it is conceded that he is sufficiently interested to justify his claim to be heard. In (1915) A C 330⁸ the parties concerned had themselves preferred an appeal to the Judicial Committee and the Attorneys-General of Canada and British Columbia seem to have intervened before the Judicial Committee. The case therefore throws no light on the question of the right of the Attorney-General of the Dominion to prefer an appeal in a case where he had intervened even in the lower Court. The report of the decision in (1937) Can S C R 427⁴² referred to in my Lord's judgment is very brief and it does not appear whether the decision was based on the language of any statute and if so what that language was. For the reasons set forth above, I would overrule the preliminary objection.

There is another aspect of the case which also deserves consideration in this connexion. The application filed by the United Provinces Government in the High Court put the plaintiffs on notice that that Government sought to come in as a party for the very purpose of placing itself in a position to prefer an appeal to this Court. If the plaintiffs had opposed the petition, the Government might have taken steps to ensure that an appeal was formally lodged by the original contesting defendant. This opportunity has now been lost to that Government and this is in a large measure attributable to the attitude taken by the plaintiffs towards

the application in the High Court. This may not create an estoppel nor suffice to confer on the Government a right of appeal which it would not otherwise possess. But if the Government can bring itself within the letter of the law, one need not hesitate to uphold its right to prefer an appeal in such circumstances.

Proceeding now to the question of the invalidity of the impugned Act, it will be convenient to take up first the ground on which all the learned Judges of the Full Bench of the High Court agreed, namely, the objection based on S. 292, Constitution Act. As I understand the argument, this objection interprets S. 292 not merely as enacting that the law in force in British India immediately before the commencement of Part. III, Constitution Act, shall continue in force notwithstanding the repeal of the earlier Government of India Act, but as also fixing a time-limit up to which the operation of such law should not be disturbed by anything contained in any enactment that may come to be passed by any of the Legislatures in British India. It was conceded before us and it was recognized before the High Court that a provision like S. 292 is usually inserted in similar Acts, to indicate that the repeal of the parent Act shall not be deemed to have repealed all the laws passed under that Act. (Compare S. 108, Commonwealth of Australia Constitution Act, s. 129, British North America Act and S. 135, Union of South Africa Act). But laying special stress on the words "until altered or repealed or amended" the learned counsel for the plaintiffs desired to read S. 292 as containing a direction by Parliament that the law then in force must in any event continue up to a specified date, namely, the date of its alteration, repeal or amendment by a later Act of the Legislatures in India; and, it was sought to be inferred therefrom that no later Act of such Legislatures can by words of retrospective operation antedate its effect so as to affect rights acquired under a previous law down to the date of the new legislation. At one stage, the learned counsel for the plaintiffs even went so far as to suggest that the Legislatures in India had been deprived by this provision of the power of enacting at any time laws with retrospective effect, or they were at least incompetent to extend the retrospective operation of their enactments to a period anterior to 1st April 1937, when the Constitution Act came into operation in the provinces. These arguments were, however,

39. ('07) 32 Bom 155; 9 Bom L R 996, *Jan Mahmood v. Syed Nurudin*.

40. (1841) 3 Beav 447, *Att.-Gen. v. Wright*.

41. ('87) 24 A I R 1937 Bom 63 : 166 I C 940 : 1 L R (1937) Bom 425 : 38 Bom L R 1283, *In re Rai Rukhiabai*.

42. (1937) Can S C R 427, *Att.-Gen. for Alberta (Intervenant) v. Kazakawich*.

not persisted in, when it was pointed out that the Indian Legislatures were, within the statutory limits assigned to them, bodies possessing plenary powers : see (1878) 3 A C 889,⁴³ (1883) 9 A C 117⁴⁴ at p. 132 and (1933) A C 156,⁴⁵ and that whatever might be the objection on grounds of reasonableness or expediency to retrospective legislation, there was nothing in S. 292 to deprive the Indian Legislatures of this particular incident of plenary legislative power. [*Compare* (1870) 6 Q B 1⁴⁶ at pp. 23, 27 relating to an Act of Jamaica Legislature; and (1915) 20 Com L R 425,⁴⁷ relating to an Act of the Commonwealth Parliament in Australia.] The objection was then limited to the power of the Legislature to give retrospective operation to an enactment when, by so doing, it would prevent a law in existence at the date of the commencement of Part III, Constitution Act, from having its full effect up to the date of the repealing or amending Act. It was pointed out that the language employed in S. 292, Constitution Act, was not identical with that to be found in the corresponding provisions in the British North America Act or in the Commonwealth of Australia Act. But, it would appear that this language is so similar to that found in S. 135, Union of South Africa Act, as to suggest that it might have been taken from it. The reason for a provision like that contained in S. 292 being the one already stated, it does not seem to me necessary or proper to lay undue stress on the word "until" used in S. 292 and hold that the policy of this provision is different from that underlying similar provisions in the other Constitution Acts above referred to. I see no justification for drawing a distinction between the statement that the previous law shall continue in force subject to repeal or amendment by later legislation and the statement that it shall continue in force until repealed or amended by later legislation. The Parliament might have had some reason or motive for denying to the Indian Legislatures the power of retrospective legislation with reference to pre-existing laws seems to me to rest on mere speculation and is not a fair inference from the language used in the section.

43. (1878) 3 A C 889, *Reg. v. Burah*.

44. (1883) 9 A C 117 : 53 L J P C 1 : 50 L T 301, *Archibald G. Hodge v. Reg.*

45. ('39) 20 A I R 1933 P C 16: 143 I C 91: (1933) A C 156 : 102 L J P C 6 : 148 L T 62 : 48 T L R 652 : 43 Ll L Rep 435 (P C), *Croft v. Dunphy*.

46. (1870) 6 Q B 1 : 10 B & S 1004 : 40 L J Q B 28 : 22 L T 869, *Phillips v. Eyre*.

47. (1915) 20 Com L R 425, *The King v. Kidman*.

In the judgments delivered by the learned Judges of the Full Bench of the Allahabad High Court, I find it stated in some places that S. 2 of the impugned Act in effect repealed S. 73 of the Act of 1926 with retrospective effect or that the provisions of the two Acts were diametrically opposed to each other. With all respect, I find some difficulty in following this view. It is true that the remission which the impugned Act sought to regularise was not one made in conformity with the provisions of S. 73 of the Act of 1926. But such regularisation would only mean the addition of a new head of remission; it may amount to an alteration or amendment of the old Act, but will not necessarily involve a repeal of S. 73 of that Act. The co-existence of two kinds of remission given for different reasons is not inconceivable or impossible. It can of course be said that the impugned Act retrospectively deprived landlords of a share of the rent to which they had already acquired a right. But if on general principles a Legislature has ordinarily power—for reasons which it is not open to the Court to investigate—to enact measures which by retrospective operation may deprive some subjects of vested rights, I see no sufficient reason for treating the present case as standing on any special footing. In this view, it will follow that there is no reason for saying (as Bajpai J. has said) that "the impugned Act has attempted to do something indirectly which it could not do directly".

Reference has been made in the judgments of the learned Judges of the High Court and reference was also made in the course of the arguments before us to the fact that a later Act of the U. P. Legislature, namely, Act 17 of 1938 took care to repeal ss. 73 to 75, Agra Tenancy Act of 1926 and to add in cl. (2) of S. 5 a provision corresponding to cl. (2) of S. 74 of the Act of 1926, while the impugned Act contains no provision corresponding to this clause. It does not appear to me that this is any legitimate ground to be considered in the present connexion. The policy of Act 17 of 1938 is apparently not the same as that of the Act of 1926, because the conditions and procedure stated in S. 4 of the new Act are not identical with those contemplated in S. 73 of the older Act and that affords a sufficient explanation for the repeal of ss. 73 to 75 of the old Act.

The additional ground of invalidation relied on by Iqbal Ahmad J. was also pressed before us at some length by the learned counsel for the respondent. With all respect,

it seems to me there is even less force in this objection than in the one based on S. 292. The only question to be considered in this connexion is whether the impugned Act can reasonably be described as one made "with respect to" any of the matters enumerated in item 21 of List II of Sch. 7, Constitution Act. Item 2 of that list is only of secondary importance in this case, because the first part of item 2 is governed by the words "with respect to any of the matters in this list"—which takes us to item 21; and the second part, namely "procedure in rent and revenue Courts" can scarcely be held to authorise legislation which in effect dealt with substantive rights, by precluding the landlord from objecting to a remission which had been improperly made under executive authority.

Both in the High Court and in the arguments before us, great stress has been laid upon the way in which S. 2 of the impugned Act had been worded and it has been said that all that the Act did was to validate arbitrary executive orders. This view does not seem to me to take the whole of S. 2 into account and give due effect to the substance of the enactment. The Preamble recites the necessity for regularising certain remissions of rent and even if we are to exclude the Preamble from our consideration, S. 2 in terms refers to the fact of remission of rent having been made under orders of the Provincial Government by reason of the fall in the prices of agricultural produce which took place before the commencement of the Act. The succeeding words can, as a matter of grammar only, mean that the order of remission thus passed shall not be called in question. There can thus be little doubt that the Act intended to deal and does deal with the subject of remission of rent made under orders of the Provincial Government. It can make no difference for the present purpose whether it laid down general provisions for remission of rent for all time or dealt with the remission made or to be made in particular years. The subject-matter in every one of these cases must be held to be remission of rent.

A point was raised in the course of the discussion before us, whether the words "such order" in S. 2 of Act 14 of 1938 referred to the order of the Provincial Government authorising the remission in general terms or to the consequent orders passed by revenue officers fixing the remission in the case of each individual or holding. I am inclined to think that the reference must be to the

order passed by the revenue officers with reference to individual holdings and the reference to the order of the Provincial Government is only to indicate the authority under which the remission was granted. This is to some extent supported by the reference in the proviso to remissions "in excess of the remission ordered for the same holding", etc. But this again is immaterial, so far as the question of the subject-matter of the Act is concerned. Whether it is the order of the Provincial Government or the consequent order of the revenue officer, the order was one which related to remission of rent and that is the subject-matter of the Act. It was pointed out that the section did not in terms purport to validate the remission, and it was argued that an Act which merely protected from attack an order which granted the remission could not be said to be an Act dealing with remission. This seems to me an unsubstantial distinction. Whatever consequences might flow from the absence of a direct provision validating the remission or precluding the landlord from recovering the remitted rent, the avowed purpose of the Act was to ensure that the tenants had the benefit of the remissions which had been made.

A point was made by the learned counsel for the respondents that S. 100, Constitution Act used the expression "with respect to any of the matters enumerated in the list" and not words like "relating to the matters enumerated in the list." It seems to me that the words "with respect" are not by any means less comprehensive than the words "relating to." [*Cf.* observations in (1915) 20 Com L R 425,⁴⁷ at p. 449; Wynes: *Legislative and Executive Powers in Australia*, at pages 28, 29.] The significance of these expressions may become important in a case where the impugned legislation contains a number of provisions relating to different matters and a question arises as to whether one set of provisions can be described as "passed in respect of a forbidden subject" or can be considered as only incidentally affecting such a subject while forming part of an Act which in the main deals with an authorised subject: see the antithesis indicated by Lord Atkin in (1937) A C 863,⁴⁸ with reference to the use of the expression "in respect of" in S. 4, Government of Ireland Act. In the present case, the Act in question deals with only one matter and the distinction between what

48. (1937) A C 868 : 106 L J P C 161 : 157 L T 874 : 81 S J 609 : 53 T L R 929 : (1937) 3 All E R 598, *Gallagher v. Lynn*.

is "substantial" and what is only "incidental" does not arise for consideration.

In coming to the conclusion that the impugned Act did not fall within any of the heads enumerated in item 21 of List II, Iqbal Ahmad J., gave it as one of his reasons that that item could only cover provisions of "substantive law" and that the impugned Act did not embody any provision of substantive law either in respect of rights over land or land tenures or the relation of landlord and tenant or the collection of rent. The fact that the provision is couched in the form of an immunity of the remission order from attack in a civil or revenue court will not, I think, take away from its character as one depriving the landlord of his right to the full rent. It is well settled that the substance of the legislation has to be examined to see what the Legislature was doing, and the form which the statute may have assumed under the hand of the draftsman is not decisive. As explained by Dr. Asthana, it might have been thought sufficient to frame the new Act on the lines of cl. (1) of S. 74, Tenancy Act of 1926. The learned Judge enumerated certain provisions which he would regard as provisions relating to the "collection of rents". But I do not see why the list given by the learned Judge should be regarded as exhausting all conceivable provisions relating to that head. Section 2 of the impugned Act had a two-fold operation; on the one hand, it prevented the landlord from questioning the order of remission with a view to recovering the full rent, on the other, it might also be held to prevent the Court *suo motu* from questioning the order of remission. In the latter sense, it might be said to be an interference with the power of the Court and it is in answer to such a possible contention that reliance seems to have been placed on behalf of the Government on item 2 of List II. One or two other objections were mentioned in the course of the argument, but I did not gather that they were seriously meant to be urged. In the result, I am of opinion that the impugned Act was within the sphere allotted to the Provincial Legislature by the Constitution Act, that it was not opposed to S. 292 of that Act and that it was *intra vires* the United Provinces Legislature.

The question still remains what is the decree to be passed in the case, in the view that the impugned Act was valid. The conclusion of the High Court against the validity of the Act will no longer hold good, but will that constitute sufficient reason for

modifying the decree of the High Court so far as it relates to the rights of the original parties? According to my reasoning in the earlier portion of this judgment, the United Provinces Government was interested only in the general question and had no other interest in the particular litigation. In 58 Cal 801,³⁶ the learned Judge limited the Advocate-General's argument to the question of jurisdiction which alone, he considered was one of public importance. The contesting defendant in the present case does not seem to me to be entitled to ask for a modification of the decree on the principle of O. 41, R. 4, Civil P. C., because there is no "decree" in this case against the Government and hence there can be no question of a decree proceeding "on a ground common to all the defendants." The anomalous situation of a decree passed against several defendants on the same ground being reversed as against some and being allowed to stand as against the rest will not arise in this case. Further the power recognized by this rule as also the one referred to in O. 41, R. 33, Civil P. C., is only discretionary and the present case is not in my opinion one in which any discretionary power ought to be exercised in favour of the contesting defendant. He has not merely acquiesced in the decree of the High Court, he has not even appeared before this Court to explain the circumstances in which he did not choose to appeal nor to ask for its modification. This is significant in view of the suggestion thrown out by Dr. Asthana that the original parties to the litigation have in all probability come to a settlement. I am accordingly of opinion that notwithstanding this Court's acceptance of the appellant's contention as to the validity of the impugned Act, there is no justification for disturbing the decree passed by the High Court in the case.

Two more contentions of the learned counsel for the respondents remain to be noticed. It was argued that Act 14 of 1938 even if valid, would not preclude the plaintiffs in this case from recovering the full rent due to them, because the Act had not been made applicable to pending actions. There can be little doubt that there is a well-recognized presumption against construing an enactment as governing the rights of the parties to a pending action. (1848) 2 Ex 22¹⁹ is an instance of the extreme limits to which this rule has been carried; for notwithstanding the doubt felt by Baron Parke in that case that the denial of the application of the Act to pending actions would

render inoperative the words "or maintained" used in the Act, the Court thought it safer not to apply the statute to pending actions. The Act now under consideration was clearly intended to be retrospective, in so far as it took away certain vested rights which had accrued before the date of its enactment. But the presumption against retrospective operation is said to be so strong that it has been recognized that even in construing an Act or a section which is to a certain extent retrospective, it ought not to be given a larger retrospective operation than the words clearly involve: *see* (1886) 31 Ch D 402.⁴⁹ There are two recognized principles, (1) that vested rights should not be presumed to be affected and (2) that the rights of the parties to an action should ordinarily be determined in accordance with the law as it stood at the date of the commencement of the action. The language used in an enactment may be sufficient to rebut the first presumption, but not the second. Where it is intended to make a new law applicable even to pending actions, it is common to find the Legislature using language expressly referring to pending actions. But it will be seen from the decision of the Privy Council in 15 Pat 268,²⁸ that it is not necessary that the intention of the Legislature should always be expressed in that particular form. In that case, the enactment validated all transactions subsequent to a specified date and their Lordships held that the new law would apply to a transaction of that kind even if it had become the subject of an action prior to the date of the passing of the Act; and in those circumstances, they reversed the usual presumption and looked to see whether there was any reservation in the Act in respect of pending actions.

The question of the applicability of the impugned Act to pending actions is likely to arise only in a few cases and whatever may be its importance to the parties to those cases, it does not seem to me to be a matter in which the United Provinces Government can be said to be interested. As I have already indicated that as between the original parties to this suit there is no justification for this Court's interference with the decree of the High Court, I do not find it necessary to express any definite opinion on the question of the extent to which the impugned Act operates retrospectively. For the same reason, I refrain from expressing any opinion on the argument urged by the learned

counsel for the respondents, as to the effect of the absence from the impugned Act of a clause corresponding to S. 74(2), Agra Tenancy Act, 1926, and S. 5 (2) of Act 17 of 1938. He argued that it might be that the impugned Act prevented the order of remission being questioned in a Court, but this would not of itself take away the contractual right of the landlord to the full rent or absolve the tenant from liability for the full amount of the stipulated rent. This again is a question relating to the construction of the Act and does not bear upon the question of its validity; and as it has not been raised or discussed before the High Court, I prefer to leave it alone, as I have held that this appeal should be dismissed for another reason. I agree that there should be no order as to the costs of this appeal.

R.K.

Appeal dismissed.

* A. I. R. 1941 Federal Court 47

(From Madras : A. I. R. 1940 Mad. 890)

6th December 1940

GWYER C. J., SULAIMAN AND
VARADACHARIAR JJ.

A. L. S. P. P. L. Subrahmanyam Chettiar
— Appellant

v.

Muttuswami Goundan — Respondent.

Advocate General, Madras — Intervener.

Case No. 4 of 1940.

(a) Government of India Act (1935), S. 100 (1) and (3) — Rule of construction, stated — (Per Gwyer C. J. and Varadachariar J.)

The rule of construction is that general language in the items of the Federal Legislative List in S. 100 (1), yields to particular expressions in the Provincial Legislative List in S. 100 (3): AIR 1921 P O 148, Rel. on. [P 50 C 2]

(b) Madras Agriculturists Relief Act (4 of 1938), Ss. 8 and 19—Whether legislation is with respect to matters in Sch. 7, List I or List II, Government of India Act—Pith and substance of impugned statute or its true nature and character should be looked to—Pith and substance of Madras Agriculturists Relief Act cannot be said to be legislation with respect to negotiable instruments or promissory notes—Fact that most debts with which it deals are based on or evidenced by such instruments is immaterial — Act does not invade forbidden field of Sch. 7, List I, Government of India Act, and therefore is intra vires of Provincial Legislature—Section 19 is limited to decrees and therefore its provisions affecting operation or effect of decree cannot be said to relate to negotiable instruments—Section 8 only lays down mode of calculation of amount to which decree is to be scaled down — Consequently Ss. 19 and 8 do not affect Ss. 32 or 79, Negotiable Instruments Act, and are not ultra vires — (Per Gwyer C. J., and Varadachariar J.; Sulaiman J., Contra.)

49. (1886) 31 Ch D 402 : 55 L J Ch 294 : 54 L T 100 : 34 W R 332, Reid v. Reid.

For the purpose of determining whether a legislation is with respect to matters in Sch. 7, List I or List II, Government of India Act, the pith and substance or true nature and character of the impugned statute should be ascertained. The pith and substance of the Madras Agriculturists' Relief Act cannot be said to be legislation with respect to negotiable instruments or promissory notes: It is quite immaterial that many, or even most, of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect its validity. The validity or invalidity of the Act cannot be affected by the money-lenders' practice of evidencing the debts of those to whom they lend money. The Act cannot be challenged as invalidating the forbidden field of Sch. 7, List I, Government of India Act, and therefore is intra vires of the Provincial Legislature: (1881) 7 A C 96; (1899) A C 580; (1882) 7 A C 829; (1930) A C 111 and (1940) A C 513, *Rel. on*; A I R 1941 Pat 99, *Disapproved*; (1891) A C 455, *Ref.* [P 51 C 1, 2]

The liability on which S. 19 operates is a liability under a decree of the Court passed before the commencement of the Act. The liability ceases to be a debt evidenced by or based on the promissory note after it has merged in the decree and become a judgment-debt. The fact that it is necessary to have recourse to the terms of the note, in order to ascertain to what extent the provisions of S. 8 required or enabled the decree to be scaled down, cannot affect the nature of the liability, which still remains a judgment-debt; and it is upon that liability and upon no other that the Act operates even though it might be necessary to go into its earlier history for a particular and special purpose. Sections 19 and 8 do not affect or purport to affect any liability on a promissory note and therefore do not affect Ss. 32 or 79, Negotiable Instruments Act, and consequently are not ultra vires: A I R 1939 Mad 361 (F B), *Affirmed*. [P 51 C 2]

(c) Government of India Act (1935), S. 214(4) — Dissenting Judge can state reasons separately even on points of concurrence — (Per Sulaiman J.)

There is nothing in the Act or in S. 214 (4) which bars the Judges who concur in one judgment from stating their reasons separately. A dissenting Judge can therefore state his reasons separately even on points of concurrence. [P 52 C 2]

(d) Government of India Act (1935), S. 104 and Sch. 7, Lists I, II and III — Determination as to in which category of Lists I, II and III matters, with which particular Act deals, fall — Resort to S. 104 can only be had after all categories are exhausted (Per Sulaiman J.)

For the purpose of determining the category in Lists I, II and III into which the matters with which a particular Act of the Provincial Legislature falls, resort to the residual power under S. 104 should be the very last refuge. It is only when all the categories in the three lists are absolutely exhausted that the Court should fall back upon a nondescript. [P 55 C 1, 2]

(e) Government of India Act (1935), S. 100 and Sch. 7, Lists I, II and III — Maxim, generalibus specialia derogant cannot be applied to Sch. 7, Lists I, II and III — Full scope of S. 100, Explained (Per Sulaiman J.)

The maxim *generalibus specialia derogant* cannot be appropriately applied to the three competing Lists I, II and III of Sch. 7. In its fullest scope, S. 100 means that if it happens that there is any

subject in List II which also falls in List I or List III, it must be taken as cut out from List II. On this strict interpretation there would be no question of any real overlapping at all. If a subject falls exclusively in List II and no other list, then the power of the Provincial Legislatures is supreme. But if it does also fall within List I, then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words "with respect to" which only signify "pith and substance," and do not forbid a mere incidental encroachment. [P 56 C 2; P 58 C 1]

(f) Interpretation of Statutes — Part of Act can be held invalid if severable — If not severable whole Act is ultra vires.

Part of an Act can be held valid and another part invalid, if they are severable. If the offending provisions are so interwoven into the scheme that they are not severable, the whole is ultra vires: A I R 1919 P C 145; A I R 1937 P C 93 and A I R 1939 F C 74, *Rel. on*. [P 59 C 2]

(g) Government of India Act (1935), Ss. 107 and 316 — Words "Federal law" mean law passed by Federal Legislature — Words "competent to enact" in S. 107 cover matters in Lists I and III. (Per Sulaiman J.)

The words "Federal law" mean law passed by the Federal Legislature, or before Federation comes into being, passed by the Indian Legislature after the coming into force of the Act and does not refer to the Indian laws which existed prior to the Act. There is nothing in the language of S. 316 which would make the expression "Federal law" in S. 107 (1) include a previously existing Indian law on a subject falling in List I. If there were fresh enactment by the Indian Legislature after Part III has come into force and before the Federation comes into existence then the provisions of S. 107(1) would certainly apply to it. The words "competent to enact" in S. 107 undoubtedly cover matters both in Lists I and III. [P 61 C 1, 2; P 62 C 1]

(h) Government of India Act (1935), Ss. 100 and 107(1) — Words "with respect to" in S. 100 cover incidental encroachment — But such encroachment is permissible only when field is actually unoccupied — (Per Sulaiman J.)

The scheme of S. 100 is to exclude completely from the authority of the Provincial Legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties the Provincial Legislatures would experience by a rigid enforcement of such an exclusion the Court must in interpreting the words "with respect to" import the Canadian doctrine of permissibility of incidental encroachment, it must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the centre and the provinces can be avoided. This also explains the apparent gap in S. 107 (1) that gap being filled in by the provisions of S. 100: *Case law referred* [P 63 C 2; P 64 C 1]

(i) Practice — Federal Court — Advocate-General intervening is not entitled to costs.

It is not the practice of the Federal Court to give costs to an Advocate-General intervening. [P 52 C 1]

Sir B. L. Mitter, Advocate-General of India (with him Mr. P. S. Sarangapani Ayyangar, Advocate, Federal Court) instructed by Mr. B. Banerjee — for Appellant.

The respondent did not enter appearance.

Sir Alladi Krishnaswami Aiyar, Advocate-General of Madras (with him Mr. N. Rajagopala Iyyangar, Advocate, Federal Court) instructed by Ganpat Rai — Intervener.

Gwyer C. J.—In this case the appellant sued the respondents in the Court of the subordinate Judge of Coimbatore for a sum of Rs. 7569-9-0, the amount of principal and interest alleged to be due under a promissory note dated 4th March 1926 for Rs. 2975. On 1st November 1934 he obtained a decree for the sum claimed, together with rupees 863-15-0 for costs, with interest at 6 per cent. per annum from the date of the judgment on the principal sum of Rs. 2975. On 22nd March 1938 the Madras Agriculturists Relief Act became law, and before that date the respondents had paid to the appellant sums which amounted in all to more than twice the amount of the principal debt. In July 1938, the respondents presented a petition under the Act claiming to have the decree scaled down in accordance with the provisions of the Act, to which the appellant replied by alleging that the Act was beyond the competence of the Madras Legislature to enact. In November of the same year there was a further petition by the respondents, praying that since they had paid more than twice the amount of the principal sum as well as the costs, the Court might be pleased to record under the Act full satisfaction of the decree. In February 1939 a Full Bench of the Madras High Court, in another case, 1 L R (1939) Mad 151¹ held that the Act was within the competence of the Legislature, and accordingly the subordinate Judge allowed the two petitions and recorded full satisfaction of the decree. A revision application to the High Court was dismissed, but the High Court gave a certificate under S. 205, Constitution Act. The appeal now comes before this Court, and the substantial question to be decided is whether the Act was within the powers of the Madras Legislature, though there are subsidiary questions also involved.

The Act is an attempt to deal in a very drastic manner with the problem of rural indebtedness, which has vexed legislators since the days of Solon. It contains, as other provincial Acts passed on the same subject

¹ ('39) 26 A I R 1939 Mad 361 : 180 I C 994: ILR (1939) Mad 151 : (1939) M L J 272 (FB), Nagra-
ratnam v. Seshayya.

during the last few years have also contained, many unusual and at first sight startling provisions. It applies to all debts payable by an "agriculturist" at the commencement of the Act, and "agriculturist" is defined in very wide terms, so as to include not only persons cultivating agricultural land but certain others also who possess an interest in such land. "Debt" is defined as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, whether payable under a decree or order of a civil or revenue Court or otherwise, though land revenue or any tax or cess payable to the Central or Provincial Government or to any local authority, together with certain other liabilities not here material, are excluded. The definition appears to be wide enough to cover damages for an actionable wrong. It is then provided by S. 7 that, notwithstanding any law, custom or decree of the Court to the contrary, all debts payable by an agriculturist at the commencement of the Act are to be scaled down in accordance with the provisions of the Act; and by S. 8 (*inter alia*) that in the case of debts incurred before 1st October 1932 where an agriculturist has paid to any creditor twice the amount of the principal, whether by way of principal or interest or both, the debt, including the principal, shall be deemed to be wholly discharged. By S. 19, the Court may apply the provisions of the Act to a decree for the repayment of a debt obtained against an agriculturist before the commencement of the Act and, notwithstanding anything contained in the Code of Civil Procedure, amend the decree or enter satisfaction, as the case may be. The Act contains no express reference to promissory notes or any other form of negotiable instrument, as debt relief legislation in other provinces, to which our attention was drawn, has sometimes done. It should be added that it was reserved for, and received, the assent of the Governor-General.

The Federal Legislature has an exclusive power to legislate with respect to cheques, bills of exchange, promissory notes and other like instruments (List. I, No. 28). The Negotiable Instruments Act, 1881, provides (S. 32) that in the absence of a contract to the contrary, the maker of a promissory note is bound to pay the amount thereof at maturity according to the apparent tenor of the note; and (S. 79) that where interest at a specified rate is expressly made payable on a note, interest is to be calculated at that

rate until payment or until such date after the institution of a suit to recover the amount as the Court directs. These provisions are not easily to be reconciled with the provisions of the Madras Act, where debts based upon promissory notes are concerned. The Court was therefore invited by counsel for the appellant to say that the Act was beyond the competence of the Madras Legislature, because it dealt with debts which in a great number of cases would be debts based upon promissory notes: or that, if not wholly invalid, it was at any rate beyond the competence of the Legislature in so far as it might affect such debts, or alternatively ought to be construed as not applying to them. A Full Bench of the Madras High Court, in the case already cited, have decided that the Madras Act does not trench in any way upon the exclusive powers of the Federal Legislature. "We do not regard the Madras Agriculturists Relief Act," said the learned Chief Justice, delivering the judgment of the Court,

as really affecting the principles embodied in the Negotiable Instruments Act. Negotiation of a promissory note is not prohibited, nor is it said that a maker or an indorser shall not be liable. The only effect of the Act, so far as negotiable instruments are concerned, is to reduce liability where the maker or indorser is an agriculturist. In providing for this the Provincial Legislature was acting in the interests of agriculture and regulating money-lending to agriculturists. It could never have been the intention of Parliament in conferring a general power on the Federal Legislature to legislate with regard to negotiable instruments to reduce the power of a Provincial Legislature to deal with subjects within its exclusive control. When examined, the Madras Agriculturists Relief Act is in substance within the express powers of the Madras Legislature and the fact that in particular cases it may operate to reduce liability on contracts evidenced by negotiable instruments cannot affect its validity.

The Chief Justice concluded by observing that the authorities, mainly decisions of the Judicial Committee on appeals from Canada, which he had already cited were definite on the point. It is therefore necessary to examine a little more closely the provisions of the Constitution Act and to see what light can be thrown upon them by decisions of the Judicial Committee and in particular by decisions upon the provisions of the British North America Act. Section 100 (3), Constitution Act, provides that a Provincial Legislature has the exclusive power of legislating with respect to the matters enumerated in List II, the Provincial Legislative List. But this power is expressly stated to be subject to the provisions of s. 100 (1), which give an exclusive power to

the Federal Legislature to legislate with respect to the matters enumerated in List I, the Federal Legislative List. Hence, though Parliament has no doubt done its best to enact two lists of mutually exclusive powers, it has also provided, *ex majori cautela*, that if the two sets of legislative powers should be found to overlap, then the federal legislation is to prevail. And the reason for this is clear. However, carefully and precisely lists of legislative subjects are defined, it is practically impossible to ensure that they never overlap; and an absurd situation would result if two inconsistent laws, each of equal validity, could exist side by side within the same territory.

The British North America Act, 1867, contains analogous provisions and it can scarcely be doubted that Parliament had those provisions in mind when it enacted the later Act. By s. 91, Canadian Act, the Dominion Legislature is given a general power to legislate for the peace, order and good government of Canada "in relation to all matters not coming within the classes of subjects by this Act assigned to the Legislatures of the Provinces", and without prejudice to the generality of the power so given the exclusive legislative authority of the Dominion is expressly declared to extend to all matters coming within the classes of subjects enumerated in the section. Section 91 further declares that any matter coming within any of the classes so enumerated shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this Act assigned exclusively to the Provinces [this corresponds to s. 100 (1), Government of India Act]. Then s. 92 gives the Provincial Legislatures exclusive authority to make laws in relation to matters coming within the list of (provincial) subjects enumerated in that section, the last class in the list being described as "generally all matters of a merely local or private nature in the province" [these provisions correspond to s. 100 (3), Government of India Act]. As interpreted by the Judicial Committee, the British North America Act presents an exact analogy to the India Act, even to the overriding provisions in s. 100 (1) of the latter :

The rule of construction is that general language in the heads of s. 92 yields to particular expressions in s. 91, where the latter are unambiguous:

per Lord Haldane in (1921) 2 A C 91² at 2. ('21) 8 A I R 1921 P O 148; (1921) 2 A O 91: 90 L J P O 102 : 37 T L R 436 : 125 L T 136 (P O), *Great West Saddlery Co. v. The King*.

p. 116. The principles laid down by the Judicial Committee in a long series of decisions for the interpretation of the two sections of the British North America Act may therefore be accepted as a guide for the interpretation of similar provisions in the Government of India Act.

It must inevitably happen from time to time that legislation, though purporting to deal with a subject in one list, touches also on a subject in another list, and the different provisions of the enactment may be so closely intertwined that blind adherence to a strictly verbal interpretation would result in a large number of statutes being declared invalid because the Legislature enacting them may appear to have legislated in a forbidden sphere. Hence the rule which has been evolved by the Judicial Committee whereby the impugned statute is examined to ascertain its "pith and substance", or its "true nature and character", for the purpose of determining whether it is legislation with respect to matters in this list or in that: (1881) 7 A C 96;³ (1882) 7 A C 829;⁴ (1899) A C 580;⁵ 1930 A C 111;⁶ 1940 A C 513.⁷ In my opinion, this rule of interpretation is equally applicable to the Indian Constitution Act. On this point I find myself in agreement with the Madras High Court, and I dissent from the contrary view which appears to have been taken in a recent case by the High Court at Patna: 3 F L J H C 119.⁸

It is clear that the pith and substance of the Madras Act, whatever it may be, cannot at any rate be said to be legislation with respect to negotiable instruments or promissory notes; and it seems to me quite immaterial that many, or even most, of the debts with which it deals are in practice evidenced by or based upon such instruments. That is an accidental circumstance which cannot affect the question. Suppose that at some later date money-lenders were to adopt a different method of evidencing the debts of those to whom they lend money;

3. (1882) 7 A C 96: 51 L J P C 11: 45 L T 721, *Citizens Insurance Co. v. Parsons*.

4. (1882) 7 A C 829: 51 L J P C 77: 46 L T 889, *Russell v. Reg.*

5. (1899) 1899 A C 580: 68 L J P C 118: 81 L T 277: 15 T L R 508, *Union Colliery Co. v. Bryden*.

6. (1930) 1930 A C 111: 99 L J P C 20: 142 L T 78: 46 T L R 1, *Att.-Gen. for Canada v. Att.-Gen. for British Columbia*.

7. (1940) 1940 A C 513: 3 F L J P C 27 (PC), *Board of Trustees of Northern Irrigation District v. Independent Orders of Foresters*.

8. ('41) 28 A I R 1941 Pat 99: 190 I C 704: 19 Pat 974: 21 P L T 789: (1940) 3 F L J H C 119, *Sagarmal Marwari v. Bhuthu Ram*.

how could the validity or invalidity of the Act vary with money-lenders' practice? I am of opinion therefore that the Act cannot be challenged as invading the forbidden field of List I, for, it was not suggested that it dealt with any item in that List other than No. 28.

It was then contended that, even if not wholly invalid, either the Act was invalid in part, in so far as it did or might affect promissory notes, or that it ought to be construed as not applying to promissory notes at all. But these questions do not in my opinion arise in the present case, because the liability on which the Act operated was a liability under a decree of the Court passed before the commencement of the Act. It had ceased to be a debt evidenced by or based on the promissory note, for, that had merged in the decree and had become a judgment-debt: nor could the appellant any longer have sued upon the note. It was argued however that before the provisions of the Act could be applied to the decree, in accordance with S. 19 of the Act, it was necessary to have recourse to the terms of the note, in order to ascertain to what extent the provisions of S. 8 required or enable the decree to be scaled down. But this could not affect the nature of the liability, which still remained a judgment-debt; and it was upon that liability and upon no other that the Act operated, even though it might be necessary to go into its earlier history for a particular and special purpose. In the present case, the judgment-debt was already in existence when the Act was passed, and it is not necessary to consider whether any different principle would be applicable in the case of decrees made after its enactment. It is sufficient to say that here the Act has neither affected nor purported to affect any liability on a promissory note.

That the provisions of the Act in their application to the decree obtained by the appellant were within the competence of the Madras Legislature to enact does not seem to me open to doubt. They may be justified by reference to Nos. 4 and 15 of List III, perhaps also to No. 2 in List II; I do not say that there may not be others, but these will suffice.

A number of other matters were argued at the Bar on which, having regard to the view of the case which I have just expressed, it becomes unnecessary for me to express any opinion. There is the difficult question, assuming that the pith and substance of the impugned Act is with respect

to matters covered by List II and not to any matters covered by List I, whether and to what extent any of its provisions which relate to matters covered by List I may still be held to be valid on the ground that they are merely incidental to its main purpose; and the further question whether their incidental character will save them if they come into conflict with Federal or Central legislation already occupying the field. These may involve yet another question, that of the true construction of S. 107 (1) Constitution Act. But though, as I have said, I reserve my opinion upon all of them, I do not wish it to be assumed that I accept in its entirety the view of the Madras High Court that the impugned Act does not really affect the principles embodied in the Negotiable Instruments Act, for, that proposition seems to me much too broadly stated. I doubt whether any provincial Act could, in the form of a debtors' relief Act, fundamentally affect the principle of negotiability or the rights of a bona fide transferee for value. Perhaps the position is different where the promissory note has never changed hands and is sued upon by the original payee; and it may be (though I do not decide the question) that an Act such as the Court is now considering can operate upon the original debt in such cases, even though the creditor has taken a promissory note in respect of his debt. If it were otherwise, the power of Provincial Legislatures to enact remedial legislation in a field peculiarly their own would be very greatly hampered; so much so, indeed, that the Central Legislature might well find itself compelled to review the situation. But it would perhaps be inadvisable that I should say more on this occasion.

I think that the appeal should be dismissed. As the respondents did not enter an appearance there will be no order for costs. It is not the practice of this Court to give costs to an Advocate-General intervening.

Sulaiman J.—This is a plaintiff's appeal arising out of a suit on a promissory note dated 4th March 1926, executed by defendant 1 for Rs. 2975 carrying interest at 36 per cent. per annum. The plaintiff claimed interest at 24 per cent. only, and the limitation was saved by payments made on 3rd March 1929 and 24th February 1932. Defendants 2 and 3 who contested the suit are the sons of defendant 1. The first Court decreed the claim on 21st November 1934. On 22nd March 1938, the Madras Agriculturists Relief

Act (IV of 1938) came into force, after the assent of the Governor-General had been given. While the decree was in execution, the judgment-debtors applied to the Court on 24th July 1938, alleging that, in view of the scaling down of the interest under the new Madras Act, the decree had been satisfied. Objection was of course taken to this by the decree-holder. The Court on 11th February 1939, held that the Madras Act was intra vires of the Provincial Legislature and ordered satisfaction of the decree to be recorded. On 27th April 1939, the plaintiff filed a revision in the High Court, but it was rejected by a single Judge on 2nd May 1939, in view of an earlier pronouncement of a Full Bench of that Court. The learned Judge granted the required certificate under S. 205 (1), Government of India Act. The application for leave to appeal was heard by a Division Bench which held that, in view of cl. 15 of the Letters Patent, the order of the single Judge was a final order. The High Court accordingly admitted the appeal.

An explanation — I feel that I owe an explanation for stating my reasons separately even on points on which there may be concurrence. I do not think that there is anything in the provisions of the Government of India Act, 1935, barring a separate statement of the reasons. Section 214 (4) merely lays down that

no judgment shall be delivered by the Federal Court save in open Court and with the concurrence of a majority of the Judges present at the hearing of the case, but nothing in this sub-section shall be deemed to prevent a Judge who does not concur from delivering a dissenting judgment.

This sub-section has obviously a two-fold effect. First, there must be the concurrence of a majority of the Judges in the final conclusion. If the Judges were equally divided the decision would be wholly inconclusive and therefore utterly useless, as it would be impossible to give any direction to a subordinate Court to select one opinion in preference to the other. Secondly, it is emphasised that a Judge who does not concur is not prevented from delivering a dissenting judgment. The sub-section does not say that reasons cannot be stated separately by the Judges who concur in one judgment. No doubt the practice of the Judicial Committee, unlike that in the House of Lords, is that one of their Lordships delivers the judgment, which is taken to be on behalf of all. But obviously there are three main reasons for it. In the first place, the decision of their Lordships of the Privy Council is in the form of a report submitted to His

Majesty. It would accordingly be wholly inappropriate to submit conflicting opinions to His Majesty. In the second place, their Lordships hear appeals from the Dominions, India and the Colonies, and it is desirable that it should not appear that there has been any divergence of opinion, so that there may be no doubts as to the correctness of the law which the Courts have to follow. In the third place, the Privy Council is the ultimate Court of appeal and it is more appropriate that the law should be settled definitely and made certain, without any expectation of its being changed if a majority in a later case comes to prefer a contrary opinion.

None of these reasons apply to the Federal Court. Here, a dissenting judgment is expressly allowed by statute. In particular, as the decision of this Court is subject to an appeal to their Lordships of the Privy Council, it is only fair that a Judge who wishes to state his reasons separately should have an opportunity to do so, in order that his full reasons may be before their Lordships when the appeal comes to be heard. It often happens that there are reasons, which may not be accepted by the other members of the Bench as sound or which may not appeal to them as being important, but which are considered by the Judge as being necessary to support the view taken by him. Frequently the way in which propositions of law may be stated are not absolutely identical. While concurring in the final result, Judges sometimes differ in stating their reasons. Grounds of decision are no less important in constitutional cases, as they may have to be applied again in a different class of cases. In the early years of the working of a constitution, when ideas have not crystallized, and rules of law applicable to it have not been clearly formulated differences of opinion are not uncommon. Such a practice is in consonance with that prevailing in the High Court of Australia and the Supreme Court of South Africa. In Canada, even after over 70 years, during which the Privy Council has made numerous pronouncements on the Canadian Constitution, separate judgments are still delivered. Even in non-constitutional cases, if important, separate judgments are frequently delivered in the Court of appeal in England.

The impugned Act — The impugned Act is the Madras Agriculturists Relief Act, 1938 (Madras Act, 4 of 1938), which received the assent of the Governor-General on 11th March 1938. The object of the Act, as men-

tioned in its preamble, was to provide for the relief of indebted agriculturists. Its relevant provisions may be summarized as follows. Section 3 (ii) (a) defines "agriculturist" as a person who has a saleable interest in any agricultural or horticultural land, with certain exceptions. Section 3 (iii) defines "debt" as meaning any liability in cash or kind, whether secured or unsecured, due from an agriculturist, payable under a decree or order or otherwise, with two exceptions. Section 7 lays down :

Notwithstanding any law, custom, contract or decree of Court to the contrary, all debts payable by an agriculturist at the commencement of this Act, shall be scaled down in accordance with the provisions of this chapter.

No sum in excess of the amount as so scaled down shall be recoverable from him or from any land or interest in land belonging to him; nor shall his property be liable to be attached and sold or proceeded against in any manner in the execution of any decree against him in so far as such decree is for an amount in excess of the sum as scaled down under this chapter.

Section 8 relates to debts incurred before 1st October 1932 and provides :

(1) All interest outstanding on 1st October 1937 in favour of any creditor of an agriculturist whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not, shall be deemed to be discharged, and only the principal or such portion thereof as may be outstanding shall be deemed to be the amount repayable by the agriculturist on that date; and

(2) Where an agriculturist has paid to any creditor twice the amount of the principal whether by way of principal or interest or both, such debt including the principal, shall be deemed to be wholly discharged.

The main part of S. 19 is as follows :

Where before the commencement of this Act, a Court has passed a decree for the repayment of a debt, it shall, on the application of any judgment-debtor who is an agriculturist or in respect of a Hindu joint family debt, on the application of any member of the family whether or not he is the judgment-debtor or on the application of the decree-holder, apply the provisions of this Act to such decree and shall, notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be.

The first question for consideration before us is whether the provisions of S. 8 read with S. 19 are "with respect to" a subject-matter in List II, as to which the Provincial Legislature has exclusive authority, or in List III, as to which it has concurrent authority, the repugnancy, if any, being cured by the assent of the Governor-General, or whether it is "with respect to" a subject within List I, as to which it has no legislative power at all.

Pith and substance — No doubt, every effort appears to have been made to make the three lists as comprehensive and exhaustive as well as exclusive as possible; and it may well be that barring personal or customary laws, it would only be extremely rare cases which would not come in any one of these three lists so as to fall within the residual powers of legislation dealt with by S. 104 of the Act. Nevertheless, in view of the large number of items in the three lists, it is almost impossible to prevent a certain amount of overlapping. Absolutely sharp and distinct lines of demarcation are not always possible. Rigid and inflexible watertight compartments cannot be ensured. A hard and fast rule of exclusion derived from the strict literal language of S. 100 may therefore be quite impracticable and unworkable. To avoid such difficulties the Imperial Parliament has thought fit to use the expression "with respect to," which obviously means that looking at the legislation as a whole, it must substantially be with respect to matters in one list or the other. A remote connexion is not enough. Those words do not connote the idea that it must be absolutely and exclusively within one list and not encroaching, not even in an indirect way, upon any other.

As pointed out by me in the U. P. Regularizations of Remissions Act case, *United Provinces v. Mt. Atiqah Begum*⁹ their Lordships of the Privy Council in dealing with Canadian cases have repeatedly laid down the test that in order to see whether an Act is in respect of a particular subject, one must look to "its true nature and character" and to its "pith and substance". It is quite wrong to assume that the doctrine of pith and substance laid down by their Lordships is some special doctrine exclusively applicable to the Canadian Constitution. Indeed, Lord Atkin in the House of Lords in (1937) A C 863¹⁰ at p. 870 applied this doctrine previously applied to the Constitution in a Federal system, to the Constitution of the Northern Ireland. His Lordship held that in pith and substance the Milk and Milk Products Act, 1934, was not a law "in respect of" trade, but was a law for peace, order and good government "in respect of" precautions taken to secure the health of inhabitants of Northern Ireland by protecting them from the danger of an unregulated supply of milk. In turn, the observation

made in *Gallagher's case*¹¹ was quoted again in 1938 A C 708¹¹ at pp. 719-720. There can therefore be no doubt that this doctrine of pith and substance is of a general application, and in no way restricted to the peculiar language employed in the British North America Act, 1867.

In view of the successive pronouncements of their Lordships of the Privy Council, though made mostly with regard to Canadian cases, it is unreasonable to assume that Parliament contemplated from the use of the words "with respect to" in the Indian Act that any overstepping beyond the limit, howsoever small or insignificant, and any encroachment upon the field of List I, howsoever unimportant, should make the Act wholly void. Incidental encroachment is not really forbidden. We have therefore first to see whether the impugned Provincial Act is "with respect to" any of the matters in List II. If this is not so, then the Act must fall to the ground. If it falls within any of the matters enumerated in that List, then we have to see next whether it also falls within any of the matters in List III. If it does and no assent of the Governor-General has been obtained, it must again fall to the ground if it conflicts with an existing Indian law. But if such assent has been obtained, then it will for the time being remain valid. Lastly we have to see whether it falls within any of the subjects mentioned in List I. If it does not, then there is no difficulty, but if it does, then we have to see further whether the Act is really "with respect to" any of the matters in List I. If it is so, then the Act must fall to the ground. If it is not, then obviously the Act indirectly, or as it has been said "incidentally" but not in substance, trenches upon List I. But in order to establish that the provisions of Ss. 7, 8 and 19 of the Madras Act are within the authority of the Provincial Legislature, it is not necessary for the respondents to show that the provisions come within any single category. So long as it can be shown that all the provisions contained therein fall within List II or List III, the province would have prima facie an authority to legislate, unless it can be shown that it is with respect to any matter in List I, or is void on account of any repugnancy.

The substance — The substance of the Act is to give relief to agriculturists in res-

9. Reported in ('41) 28 AIR 1941 F C 16.

10. (1937) 1937 A C 869: 106 L J P C 161: 157 L T 374: 81 S J 609: 53 T L R 929: (1937) 3 ALLER 598, *Gallagher v. Lynn*.

11. ('39) 26 AIR 1939 P C 36: 180 I C 598: 1938 A C 708: 107 L J P C 115: 82 S J 728: 54 T L R 1090 (P C), *Shannon v. Lower Mainland Dairy Products Board*.

pect of interest accruing upon the debt due from them. In one aspect it relates to money-lending and money-lenders because the reduction of interest on loans made to them by money-lenders would affect money-lending transactions. It is certainly a measure relating to agriculturists in the main, though an agriculturist is defined in a somewhat wider sense and though the debt due from him is not confined to loans taken for agricultural purposes, but includes any liability due from him. But, there can at the same time be no doubt that the scheme of the Act is to benefit the agriculturists as a class and relieve them from onerous burden of high interest, from which the Provincial Legislature thought they had been unfairly suffering. It may be, literally speaking, difficult to say that benefit to agriculturists (defined in a somewhat wide way) is included in the term "agriculture." On the other hand, it may well be that unless agriculturists are relieved from their financial troubles, agriculture itself may suffer. Again, agricultural lands may deteriorate in value if they are sold frequently at auction in lieu of debts, and pass from hand to hand, sometimes to persons who are unable to cultivate them themselves. Further, the provision for scaling down interests is certainly an interference with the contract between the lender and the borrower, and can well come within the category "contract": List III, Entry No. 10.

It may be that in view of the wide definition of "agriculturist," all the provisions do not come within the category of agriculture; and it may also be that in view of the circumstance that "debt" means any liability, whatsoever, all the provisions may not come within the category "money-lending." And it may also possibly be that in some extreme cases the liability may go outside the category "contract," and may fall within "trade and commerce," (e. g., unpaid purchase money). But taking all the provisions together and considering the Act as a whole, it cannot be doubted that it is with respect to matters in Lists II and III. It is most difficult to place it outside these two lists. Indeed, the Advocate-General of India has conceded that he cannot lay his finger on any category in List I, within which this Act could fall. He therefore felt compelled to urge before us that the Act deals with matters outside all the lists, and can therefore come only under the residual power mentioned in s. 104 of the Indian Act. But resort to that residual power should be the very last refuge. It is only when all the

categories in the three lists are absolutely exhausted that one can think of falling back upon a *nondescript*. It seems to me that this cannot be done in the present case. The legislative practice in India prior to the commencement of the Government of India Act also shows that in the various provinces there were existing legislations for relief from high rates of interest. It is therefore impossible to hold that the impugned Act is wholly outside Lists II and III of Sch. 7.

Negotiable instruments — As the impugned Act deals with all debts of agriculturists, it necessarily includes their debts due on negotiable instruments as well. But List I, Entry No. 28 specifically and expressly assigns "cheques, bills of exchange, promissory notes and other instruments" to the Federal Legislature. Being of all-India importance there was a special reason for assigning negotiable instruments to the Federal Legislature. A uniformity of practice as regards these for the whole of India is necessary. As they can be freely negotiated, they can circulate from province to province, and after successive endorsements can even be sued upon in provinces other than those in which they were executed. As they pass from hand to hand, holders in due course have to be protected. They are allowed to presume that the consideration evidenced by such instruments is due in full. Holders in due course cannot be expected to inquire and ascertain whether the original maker had been an agriculturist or not; and it would be grossly unfair to such holders, if after having paid almost full consideration for such instruments, they were confronted in a suit brought upon them with a provincial law that cuts down interest which accrued even prior to the passing of that Act. As the impugned Act deals with debts in general, it would be difficult to say that the Act, taken as a whole, is "with respect to" negotiable instruments mentioned in the aforesaid category. But at the same time it is impossible to deny that the Act encroaches upon the field covered by such instruments. It would have been open to the Provincial Legislature expressly to exclude such instruments from the operation of this Act, (as had been done partially in s. 2 (vii) (e), C. P. Act, 13 of 1934); but that has not been done. It is accordingly impossible to hold that there is no trespass on the Federal legislative field. There is an apparent overlapping, and no clear-cut demarcation is discernible. The question is how this obvious conflict can be avoided.

Restricted interpretation — The principle of interpretation which was applied by me in 1939 F C R 18¹² at pp. 74, 75 and 87 was that it should certainly be our earnest endeavour to avoid a conflict between two apparently competing entries, as too liberal an interpretation given to both of them might create a clash. "As far as possible, an undefined term should not be given such a wide scope as to include a particular provision." If a subject comes within a special and specific provision, and can only by defining and enlarging the meaning of the words be brought within the scope of the general, then the special provision should be considered to be exclusive of the other. But, of course, where such a restricted interpretation is not possible, overlapping may be inevitable.

Principle of exception — This principle, coupled with that of an exception to a general provision, was also applied in that case by my Lord the Chief Justice, who relying on (1887) 12 A C 575¹³ at pp. 586-587 observed (pp. 49-50, Federal Court Reports):

It would accord with sound principles of construction to take the more general power, that which extends to the whole of India, as subject to an exception created by the particular power, that which extends to the province only. It is not perhaps strictly accurate to speak of the provincial power as being excepted out of the federal power, for the two are independent of one another and exist side by side. But the underlying principle in the two cases must be the same, that a general power ought not to be so construed as to make a nullity of a particular power conferred by the same Act and operating in the same field, when by reading the former in a more restricted sense effect can be given to the latter in its ordinary and natural meaning.

My brother Jayakar J., on p. 118, relying on the ruling in 1912 A C 880¹⁴ at pp. 885 to 887 adhered to the principle of exception and observed :

In other words, as I interpret the two entries, entry No. 45 (List I) may be said to contain a general power to levy excise duty at all stages. As an exception to this, a portion of the power is cut out and allocated to the provinces under entry No. 48 (List II). It operates as an exception to the general power conferred by entry No. 45.

On the other hand, at p. 94, I did not feel myself able to apply the principle that where a particular power comes within both the two mutually exclusive jurisdic-

tions, as in Canada, it should be regarded as an exception to the general one. I pointed out that an exception falls within and not outside a general provision, the essence of the principle being that a particular exception restricts a general provision, although covered by it. In the Indian Constitution there being a definite provision for overlapping, where such an overlapping is inevitable, the general power of the Centre would override even a particular power of a province. I was of the opinion that the power of the Centre to tax consumption, if inclusive, would not admit of any exception in favour of the provinces, but must prevail. The maxim *generalibus specialia derogant* cannot be appropriately applied to the three competing lists. I see three difficulties in importing from the Canadian cases the doctrine of the exception to the general provision. In the first place, it may very often be difficult to decide which is general and which is particular or special. The mere fact that a Central Act may apply to the whole of India whereas a provincial Act to a smaller area of the province, would not make the latter an exception, for, that would, in most cases, make a provincial law override a Central law. In some cases two subjects may both be general, and only particular parts of them may be overlapping. For instance 'a promissory note' is a general category, but 'a promissory note executed by an agriculturist' is special. On the other hand, 'debt' is general, but 'debt due on a promissory note' is special. Either of the two categories 'debt due on a promissory note' and 'debt due from an agriculturist' can be regarded as particular and the other more general according to the point of view from which we look at them. A second serious difficulty is that by applying the rule of exception, we would have to cut out, as Jayakar J. has expressly said, a portion of the power given to the Centre and allocate it to the provinces exclusively, so that even though the general provision would include such a power, the Centre would be prevented from legislating with respect to it at all. The third difficulty in the way of importing such a rule is that the provisions in the two constitutions are not identical, and the categories are not in *pari materia*.

Canadian Sections — Sections 91 and 92, British North America Act, show the dominant position of the Dominion Legislature, but with restrictions. First of all, power is given to the Dominion to make laws for "the peace, order, and good government of

12. ('39) 26 A I R 1939 F C 1 : 180 I C 161 : 1939 F C R 18 : I L R (1939) Kar F C 6 (F C). In the matter of C. P. & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938.

13. (1887) 12 A C 575 : 56 L J P C 87 : 57 L T 377, Bank of Toronto v. Lambe.

14. (1912) 1912 A C 880 : 81 L J P C 237:107 L T 330 : 28 T L R 580, In re Marriage Legislation in Canada.

Canada"; but from this are excepted the classes of subjects exclusively assigned to the Provincial Legislatures under S. 92. The exception itself is, however, subject to the exclusive power of the Dominion Legislature with respect to matters specifically enumerated in S. 91. It is then emphasized that any matter coming within any of the classes of subjects specified in S. 91 shall not be deemed to come within the class of matters of local or private nature comprised in the enumeration of the classes of subjects assigned to the Provincial Legislatures. The difficulty in Canada has been that the power of the Dominion Legislature extends to the very wide field "peace, order and good government," and also includes the residuary power in respect of matters not allocated to the provinces. Another difficulty is that the last class in S. 92 is also expressed in general language "generally all matters of a merely local or private nature in the province." Again, the provinces have power as regards "property and civil rights in the province." There is a further complication arising from the categories direct and indirect taxation. In particular, while S. 91 specifically mentioned "26. Marriage and Divorce," S. 92 also specifically mentioned "12. The Solemnization of Marriage in the province." In view of such general categories, it is no wonder that overlapping was not impossible. And yet there was no statutory provision corresponding to S. 107 of the Indian Act. Their Lordships of the Privy Council in the various Canadian cases which came up for consideration always laid down that the competing subjects in the two lists should be read and interpreted together so that it may be possible

to arrive at a reasonable and practical construction of the language of the sections, so as to reconcile the respective powers they contain, and to give effect to all of them: (1881) 7 A C 96³ at p. 109.

But as overlapping was inevitable, their Lordships further evolved the principle:

Notwithstanding this endeavour to give pre-eminence to the Dominion Parliament in cases of a conflict of powers, it is obvious that in some cases where this apparent conflict exists, the Legislature could not have intended that the powers exclusively assigned to the Provincial Legislature should be absorbed in those given to the Dominion Parliament.

In 1912 A C 880,¹⁴ the question for consideration was whether in view of the category "Marriage" in S. 91, the category "The Solemnization of Marriage in the province" could be completely excluded from the authority of the Provincial Legislature. There

were only two alternatives open: first, that the solemnization of marriage which was specifically and expressly assigned to the provinces should be considered as a particular exception to the general provision about marriage, or secondly, it should be held that Parliament had made an awful mistake in specifically allotting the solemnization of marriage to the provinces, when in view of the more general category "Marriage" they could not legislate with respect to such solemnization at all. Their Lordships naturally preferred the former course. In (1921) 2 A C 91,² Lord Haldane after stating 'the rule of exception' applicable to the heads of Ss. 91 and 92, added:

Neither the Parliament of Canada nor the Provincial Legislature have authority under the Act to nullify, by implication any more than expressly, statutes which they could not enact.

Indian section — Now although the object of S. 100, Government of India Act, is the same, the language is not identical. Taking S. 100 strictly literally, it would certainly follow from the double restriction imposed on a Provincial Legislature that its exclusive power is limited so as to ensure that Federal laws must dominate in the fields of Lists I and III. While the Federal Legislature is given power, it is expressly provided that "a Provincial Legislature has not power to make laws with respect to any of the matters enumerated in List I." And this exclusion of power is "notwithstanding anything in the two next succeeding sub-sections." Again, in sub-s. (2), while both the Federal Legislature and a Provincial Legislature have power to make laws with respect to any of the matters enumerated in List III, this is "notwithstanding anything in the next succeeding sub-section." The exclusive power of a Provincial Legislature with regard to matters in List II is provided for in sub-s. (3), but it is again emphasized that this last sub-section is "subject to the two preceding sub-sections." On a very strict interpretation of S. 100, it would necessarily follow that from all matters in List II which are exclusively assigned to Provincial Legislatures, all portions which fall in List I or List III must be excluded. Similarly, from all matters falling in List III, all portions which fall in List I must be excluded. The section would then mean that the Federal Legislature has full and exclusive power to legislate with respect to matters in List I, and has also power to legislate with respect to matters in List III. A Provincial Legislature has

exclusive power to legislate with respect to List II, minus matters falling in List I or List III; has concurrent power to legislate with respect to matters in List III, minus matters falling in List I. In its fullest scope, S. 100 would then mean that if it happens that there is any subject in List II which also falls in List I or List III, it must be taken as cut out from List II. On this strict interpretation there would be no question of any real overlapping at all. If a subject falls exclusively in List II and no other list, then the power of the Provincial Legislatures is supreme. But if it does also fall within List I, then it must be deemed as if it is not included in List II at all. Similarly, if it also falls in List III, it must be deemed to have been excluded from List II. The dominant position of the Central Legislature with regard to matters in List I and List III is thus established. But the rigour of the literal interpretation is relaxed by the use of the words "with respect to" which as already pointed out only signify "pith and substance," and do not forbid a mere incidental encroachment. But, even if such an incidental encroachment may be ordinarily permissible, the field may not be clear. There may be competency and yet repugnancy also. The question is how to prevent a clash if the trespass is on a field already occupied by a Central Legislation.

The Negotiable Instruments Act—There is in force a Central Legislation, namely, the Negotiable Instruments Act, 1881, (Act 26 of 1881) which deals with negotiable instruments, now specifically included in List I. Section 32 of this Act provides that in the absence of a contract to the contrary, the maker of a promissory note is bound to pay the amount thereof at maturity according to the apparent tenor of the note. Section 79 in more specific language lays down :

When interest at a specified rate is expressly made payable on a promissory note or bill of exchange, interest shall be calculated at the rate specified, on the amount of the principal money due thereon, from the date of the instrument, until tender or realization of such amount, or until such date after the institution of a suit to recover such amount as the Court directs.

Parties cannot even contract out of their statutory rights. Thus, in the case of a promissory note or bill of exchange, interest has to be calculated till at least the institution of the suit, at the rate specified therein. Any provincial law providing that the interest prior to the suit should be curtailed or cut down, is *prima facie* in conflict with it.

It will be trenching upon a field already occupied by S. 79.

After the Negotiable Instruments Act, came the Usurious Loans Act (Act 10 of 1918), as amended by Act 28 of 1926, which also was a Central Act. Now usurious loans undoubtedly come within "money-lending", which is specifically included in List II. As pointed out by me in the *U. P. Regularization of Remissions Act case*,⁹ an earlier Act can be modified, by necessary implication, by the provisions of a later Act. The Negotiable Instruments Act must therefore be read along with the Usurious Loans Act, as well as any provincial law on the subject that existed in March 1937, and they all taken together constitute the existing Indian law on the subject of negotiable instruments. Under S. 3 of the latter Act where (a) interest is excessive, or (b) the transaction is substantially unfair, a Court is empowered to reopen the transaction and relieve the debtor of his liability for excessive interest, in spite of any contract or agreement. But there are two provisos : The Court cannot (i) reopen an agreement which is more than 12 years old, or (ii) do anything which affects any decree of a Court. There was also protection given to a bona fide transferee for value. The combined effect of the two enactments was that where the interest was excessive or the transaction was substantially unfair, a Court could go behind the rate of interest entered in a promissory note, reopen the transaction and disallow all excessive interest up to 12 years earlier, but could not go behind a decree passed on a promissory note. As pointed out by me in the *U. P. case*,⁹ referred to above, the effect of S. 292, Government of India Act, is not only to ensure that the existing Indian laws were not repealed, but actually to continue them in force until altered, repealed or amended by a competent Legislature. And a Provincial Legislature is not competent to alter, repeal or amend any law with respect to matters falling in List I. It follows that a Provincial legislation cannot nullify any such law.

The impugned Act permits the reopening of a final transaction evidenced by a promissory note even beyond a period of 12 years. It also enables a Court to reopen a decree already passed and to modify it. It is not a mere case where the Provincial Legislature has fixed limits for testing the excessiveness of interest, enabling a Court to reduce the interest according to a pres-

cribed scale, whether or not the interest is in its own opinion excessive, and whether or not the transaction in its own opinion is substantially unfair. Nor is it a case where only pendente lite interest is scaled down, nor even a case where the provisions apply to a suit in which a decree is to be passed in future. Nor does it even protect bona fide holders in due course. Had the provision been confined to the interest after the suit was filed, there would have been no such conflict. Interest pendente lite is in the discretion of the Court under S. 34, Civil P. C., and the Court's power to allow it is left untouched by S. 79, Negotiable Instruments Act. It draws no distinction between the original promisee and a holder in due course. The special hardship that would be inflicted on the latter is not at all taken into account in the Act and the special protection given to bona fide holders in due course by the Negotiable Instruments Act read with the Usurious Loans Act is destroyed. Had it been confined to the scaling down of the interest before a decree is passed, it might have come within the modification introduced by the Usurious Loans Act. But it affects decrees previously passed on promissory notes, which could not have been touched at all under the existing Indian laws in Madras. It is thus not a case where the power of a Provincial Legislature *eo nomine* in the absence of any Central legislation is to be considered, but a case where such legislation actually exists and already occupies the field.

Decree — The Advocate-General of Madras has strongly urged before us that this is a case where the debt due on a promissory note had merged in a decree long before the impugned Act came into force, and that we must accordingly confine our attention to the facts of this particular case. His contention is that before the Act came into force the matter had passed beyond the domain of promissory notes into that of a decree, or as he put it "contract by record," and that so much of the impugned Act as relates to a decree of the Court cannot be said to be in conflict with any provisions of the Negotiable Instruments Act, and must therefore be upheld. The judgment of the High Court is not based on any such ground. Now S. 8, sub-s. (1) provides for the discharge of interest

whether the same be payable under law, custom or contract or under a decree of Court and whether the debt or other obligation has ripened into a decree or not,

Sub-section (2) provides for the discharge of the principal in a certain case. These sub-sections are substantive provisions which alter the terms of the contract and the decree, whether passed before or after the Act. Section 19 enjoins upon a Court the duty of reopening a decree, although passed before the impugned Act, and provides that on application made, the Court

shall apply the provisions of this Act to such decree and shall notwithstanding anything contained in the Code of Civil Procedure, 1908, amend the decree accordingly or enter satisfaction, as the case may be.

Section 8 has the effect of extinguishing the interest on a debt whether it "has ripened into a decree or not." It applies equally to decrees that were passed before the commencement of the Madras Act as well as to those to be passed thereafter. On the other hand, S. 19 prevents a Court from seeking shelter behind the finality of a decree already passed, and makes it obligatory on the Court to amend it, so as to make it accord with the provisions of S. 8. This is compelling it to pass almost a fresh decree. Taking all the provisions together, particularly S. 8, it is very difficult to sever and split up the contract of the loan and the decree passed by a Court on the basis of it. It seems to me that the two are inextricably mixed up together and indissolubly connected. Section 8 treats the liability as a debt wholly irrespective of the fact whether it is a decretal debt or not. I do not read these provisions as indicating that even if the contract could not be interfered with the decree can be amended. It rather seems to me that both the contract and the decree obtained on it hang together and must stand or fall together so far as the lists go.

Their Lordships of the Privy Council have laid down in several cases that part of an Act can be held valid and another part invalid, if they are severable. "If the offending provisions are so interwoven into the scheme that they are not severable," the whole is *ultra vires*: 1919 A C 935 at p. 944 = A I R 1919 P C 145.¹⁵ In 1937 A C 377¹⁶ at page 388, their Lordships found "the whole texture of the Act so inextricably interwoven" that one part could not be contemplated as existing independently of the other. In 1939

15. ('19) 6 AIR 1919 P C 145 : 1919 A C 935 : 68 L J P C 142 : 121 L T 651 : 35 T L R 630 (PC), *In re the Initiative and Referendum Act*.

16. ('37) 24 AIR 1937 P C 93 : 168 I O 10 : 1937 A C 377 : 106 L J P C 64 : 81 S J 235 : 53 T L R 330 (PC), *Attorney-General for British Columbia v. Attorney-General for Canada*.

F C R 193¹⁷ at p. 213, I had relied on these cases and pointed out that:

It is a well-established principle that if the invalid part of an Act is really separate in its operation from the other parts, and the rest are not inseparably connected with it, then only such part is invalid, unless of course the whole object of the Act would be frustrated by the partial exclusion. If the object which is beyond the legislative power is perfectly distinct from that which is within such power, the Act can be ultra vires in the former, while intra vires in the latter.

But I am not aware of any case in which the same section containing similar provisions for contract as for the decree based on it has been considered to be severable so as to make the latter valid, while the former is invalid. Obviously, the main object of the Madras Legislature was to relieve the agriculturists of their liability to pay excessive interest. This was an interference with the contract between the parties. The method adopted for achieving this object was to declare that the interest shall be deemed to be discharged in certain cases, whether a decree has been passed or not, and then to compel Courts to amend the decree if already passed. Now, if the Provincial Legislature had no power to amend the contract evidenced by the promissory note, so as to deprive the promisee of his right to recover interest due under it, it seems to me that it could not exercise the same power in an indirect way by providing that the Court should not pass a decree for such interest, or that if once a decree is passed, the decree should be amended so as to deprive him of that interest. If a Legislature has no power to enact that interest should be cut down before a decree comes to be passed, it would be anomalous to assume that nevertheless it has power to cut down interest from a decree already passed. "It is a very familiar principle that you cannot do that indirectly which you are prohibited from doing directly": 1899 A C 626¹⁸ at pp. 627-628 and 1940 A C 513¹⁹ at p. 534.

It seems to me that where a Court is bound by a statute to amend a decree and alter the amount due under it which it would not otherwise have power to do, there is an interference with the powers of that Court, if not of its jurisdiction. Legislatures in India have no authority to interfere with the jurisdiction and powers of Courts, except with respect to matters com-

ing within their lists. Entries No. 53 of List I, No. 2 of List II and No. 15 of List III make that perfectly clear. If a Legislature is not competent to deal with a subject-matter, then it is equally incompetent to affect the jurisdiction and powers of the Court with respect to that matter. If this were not so, the result would be that even though a Legislature may have no power to legislate directly on a particular subject embracing a pecuniary liability, it could indirectly legislate that when the dispute comes in a Court, the decree should be passed in a particular way, or a decree already passed should be amended in that way. This would introduce a serious anomaly and would enable Legislatures freely to encroach upon other fields indirectly, and at the same time effectively.

In 3 F L J 1¹⁹ at p. 5 I have expressed the opinion that the provision in S. 11, Bihar Money-Lenders Act (3 of 1938) that "no Court shall . . . pass a decree for an amount of interest, etc." affected the powers of Courts. In the Bihar case, *Lachmeshwar Prasad Shukul v. Keshwar Lal Chaudhuri*,²⁰ decided today, also, I have expressed the opinion that the same provision in the corresponding S. 7, Bihar Money-Lenders (Regulation of Transactions) Act (7 of 1939) does affect the powers of a Court. Similarly, in the present case, I am of the opinion that the provision in S. 19 that a Court "shall . . . apply the provisions of this Act to such decree . . . amend the decree accordingly or enter satisfaction," does affect the powers of the Court. Obviously, it is not a mere matter of simple procedure or method.

Section 8 contains a substantive provision directly depriving a creditor of a part of his debt. As in a case where twice the amount of the principal had already been paid by way of interest previously, even the outstanding amount of the principal is to be completely wiped out, the interference is not only with the claim for interest, but for the principal sum as well. It is not "a matter included in the Code of Civil Procedure," as mentioned in List III, No. 4. Section 19 enjoins upon the Court the duty of giving effect to those provisions where a decree has already been passed. It is really not an independent provision but a necessary consequence of S. 8, which applies both to a simple debt and debt due "under a decree" whether the

17. ('39) 26 AIR 1939 F C 74 : 182 I C 161 : 1939 F C R 193 : I L R (1939) Kar F C 165 (F C), *Shyamakanta Lal v. Rambhajan Singh*.

18. (1899) 1899 A C 626 : 68 L J P C 148 : 81 L T 276 : 15 T L R 484, *Madden v. Nelson and Fort Sheppard Rly.*

19. ('40) 27 AIR 1940 F C 1 : 185 I C 1 : I L R (1940) Kar F C 45 : (1940) 3 F L J 1 (F C), *Ram-nandan Prasad v. Madhwanand Ramji*.

20. Reported in ('41) 28 AIR 1941 F C 5.

debt "has ripened into a decree or not." In my opinion if a legislation is 'with respect to decrees passed on promissory notes' then it is necessarily also 'with respect to promissory notes.'

I am accordingly unable to split up and separate the provision of law with regard to decrees from the provision of law with regard to debts. In my opinion the former is inseparable from the latter and the power to deal with it is dependent on the existence of the power to deal with the latter, except for repugnancy. Further, the latter provision is in direct conflict with the provisions of the Negotiable Instruments Act, read with the Usurious Loans Act, and therefore amounts to an undoubted trespass on a field already occupied by an existing Indian law with respect to negotiable instruments.

Repugnancy under Section 107 — While in Canada the solution where a repugnancy exists is mostly a judge-made law, in the Indian Act the principle is embodied in S. 107, which in the event of repugnancy in certain cases makes the law of the Central Legislature prevail over that of the Province, even though there would be competency if there had been no such Central legislation. It has been suggested by the Advocate-General of India that by virtue of the provisions contained in S. 316 of the Act "a Federal law" referred to in S. 107 (1) should include "an existing Indian law" on a subject which falls within List I. His point is that the expression "which the Federal Legislature is competent to enact" merely means a subject in List I and that it applies to all previous laws of the Central Legislature and is not necessarily confined to laws of the Indian Legislature passed after the coming into force of the Government of India Act. This contention, if accepted, would raise several difficulties. According to strict grammar, the present tense "is competent to enact" would not necessarily mean 'had been or was competent to enact'. Furthermore, the existing Indian law with respect to matters enumerated in the Concurrent List, is expressly mentioned as an alternative to "Federal law". There is therefore no point in saying that Federal law, which the Federal Legislature is competent to enact, means an existing law on a subject, in Lists I and III. The learned Advocate-General of India is therefore compelled to urge that it refers only to matters in List I; but such an argument would not be convincing as the words "competent to enact"

undoubtedly cover matters both in Lists I and III.

Federal law — An examination of the language employed in S. 316 points to the conclusion that the "Federal law" must mean law passed by the Federal Legislature, or before Federation comes into being, passed by the Indian Legislature after the coming into force of the Act, and does not refer to the Indian laws which existed prior to the Act. In S. 311 "provincial law" is defined as meaning an Act passed or law made by a Provincial Legislature established under this Act, and the expression "existing Indian law" means any law made before the commencement of Part III of the Act by any competent Legislature, no matter whether the Central or a Provincial Legislature. The latter thus includes all the laws that were in existence at the time of the coming into force of the Government of India Act, no matter whether they had been made by the then Central or Provincial Legislatures. What S. 316 lays down is that the powers conferred by the Act, on the Federal Legislature shall be "exercisable" by the Indian Legislature and references to the Federal Legislature and the Federal laws shall be construed as references to the Indian Legislature and laws of the Indian Legislature. The expression "The powers . . . shall be exercisable, etc." obviously implies the exercise of such powers in the future. That has no reference to Acts passed previously in the exercise of powers that existed before the Act came into force, for they come within the category 'existing Indian law'. It is obvious that "the powers conferred by the provisions of this Act" cannot "be exercisable by the Indian Legislature" unless the occasion arises after the Act has come into force. It follows that the first portion of S. 316 necessarily and unmistakably refers to Acts which are to be passed thereafter. The second portion begins with the words "and accordingly". The significance of these words is that the second portion of S. 316 is consequential, that is to say, is the result of the exercise of the powers conferred by the provisions of this Act. So that it again follows that this later provision also must refer to the laws of the Indian Legislature which in future come to be enacted by the Indian Legislature, in the exercise of the powers conferred by this Act on such Legislature. Three different kinds of expressions have been used in the Act viz., "Federal law", "existing Indian law" and "laws of the Indian Legislature."

There is absolutely no reason to suppose that Federal law was intended to include any part of the existing Indian law. I am accordingly unable to see that there is anything in the language of S. 316 which would make the expression "Federal law" in S. 107 (1) include a previously existing Indian law on a subject falling in List I. Of course, if there were a fresh enactment by the Indian Legislature after Part III has come into force and before the Federation comes into existence, then the provisions of S. 107 (1) would certainly apply to it. For purposes of the transitional period, one may paraphrase the sub-section as meaning "if any provision of a provincial law made by a Provincial Legislature established under this Act, is repugnant to any provision of any laws of the Indian Legislature made after Part III has come into force, which the Indian Legislature is competent to enact, etc."

It follows that so far as the old law is concerned, it is only the latter portion of the sub-section which can, if at all, apply to it. But this portion is restricted to provisions of an existing Indian law with respect to one of the matters enumerated in the Concurrent List, and does not at all refer to any existing Indian law with respect to one of the matters enumerated in the Federal List. If the matter were one falling within the Concurrent List, then the repugnancy is cured completely by the assent of the Governor-General obtained subsequently.

It seems at first sight strange that S. 107 should be incomplete as regards the existing Indian laws, and that provisions of repugnancy aiming at the removal of an inconsistency between federal and provincial laws should be unnecessarily restricted and should leave a gap. After Federation has come into force, or even after the Indian Legislature has re-enacted any old law, the difficulty may perhaps disappear. This would be so, if the words "with respect to one of the matters enumerated in the Concurrent List" were held to qualify only "an existing Indian law" and not "a Federal law" mentioned earlier. This would be putting a liberal interpretation so as to make the provincial law, which is repugnant to a Federal law in respect of a matter in List I or List III, void to that extent. But S. 107 (1), as it stands, does not apply to the case where there is a repugnancy between a provincial law enacted after the Act came into force, and an existing Indian law made prior to the Act, but falling within List I.

If there were no other restriction on the power of the Provincial Legislature, the result would be that while the Provincial Legislature would not be competent to make a provincial law repugnant to an existing Indian law relating to the Concurrent List, it would have almost a free hand to encroach upon the field of List I, regardless of the provisions of all the existing Indian laws. Such an untoward result could not have been contemplated. If it was necessary to impose drastic restrictions on the power to legislate with regard to the Concurrent List, where the whole field is open to a Provincial Legislature, it would be all the more necessary to impose even more drastic limitations on the powers of a Provincial Legislature to make legislation repugnant to the existing Indian law with respect to matters which have been expressly taken out of the authority of the Provincial Legislature. The principle of repugnancy embodied in S. 107 was presumably borrowed from the trend of decisions in Canadian cases, and might have been borrowed in full, so as not to leave a gap. But, even if this sub-section is not comprehensive, it does not follow that there is any gap which cannot otherwise be filled up. Apparently, it was thought that as the provinces had been given any authority to legislate with respect to matters falling in List I, all cases where there is an encroachment would be met by S. 100 itself.

Unoccupied field — The doctrine which has been evolved with regard to the Canadian cases is that if the encroachment is merely incidental, then there is no defect so long as the trespass is upon an unoccupied field. Engrafted upon the doctrine of incidental encroachment there is the further doctrine of unoccupied field. In 1894 A C 189²¹ at pp. 200-201 the Lord Chancellor observed :

They would observe that a system of bankruptcy legislation may frequently require various ancillary provisions for the purpose of preventing the scheme of the Act from being defeated. It may be necessary for this purpose to deal with the effect of executions and other matters which would otherwise be within the legislative competence of the provincial Legislature. Their Lordships do not doubt that it would be open to the Dominion Parliament to deal with such matters as part of a bankruptcy law, and the Provincial Legislature would doubtless be then precluded from interfering with this legislation inasmuch as such interference would affect the bankruptcy law of the Dominion Parliament. But it does not follow that such subjects, as might pro-

21. (1894) 1894 A C 189 : 63 L J P C 59 : 6 R 409 : 70 L T 538, *Attorney-General of Ontario v. Attorney-General for the Dominion of Canada*.

perly be treated as ancillary to such a law and therefore within the powers of the Dominion Parliament, are excluded from the legislative authority of the Provincial Legislature when there is no bankruptcy or insolvency legislation of the Dominion Parliament in existence.

In 1907 A C 65²² at p. 68, Lord Dunedin observed that the earlier cases seemed to establish two propositions:

First, that there can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires, if the field is clear; and, secondly, that if the field is not clear, and in such a domain the two legislations meet, then the Dominion legislation must prevail.

In 1930 A C 111⁶ at p. 118, Lord Tomlin when dealing with the questions of conflict between the jurisdiction of the Parliament of the Dominion and the provincial jurisdiction, laid down four propositions as a result of the previous decisions of their Lordships, the last two being:

It is within the competence of the Dominion Parliament to provide for matters which, though otherwise within the legislative competence of the Provincial Legislature, are necessarily incidental to effective legislation by the Parliament of the Dominion upon a subject of legislation expressly enumerated in S. 91.

and

There can be a domain in which provincial and Dominion legislation may overlap, in which case neither legislation will be ultra vires if the field is clear, but if the field is not clear and the two legislations meet the Dominion legislation must prevail.

In 1940 A C 513⁷ at pp. 531, 532, the Lord Chancellor declining to put a 'restricted interpretation' on the term "interest," observed:

Even if it could be said that the Act relates to classes of subjects in S. 92 as well as to one of the classes in S. 91, this would not avail the appellants to protect the Provincial Act against the Interest Act of 1927, passed by the Dominion Parliament, the validity of which, in the view of their Lordships is unquestionable . . . Dominion legislation properly enacted under S. 91 and already in the field must prevail in territory common to the two Parliaments.

In 3 F L J 46²³ at p. 51 where the amount due on an earlier promissory note had formed part of the mortgage money, I distinguished the case by pointing out that the suit being on a mortgage the field was apparently clear, and, therefore, the question of interfering with the interest due on the promissory note did not directly arise. No Canadian case has been cited before us in which although the subject of legislation was substantially within S. 92, it not only incidentally encroached upon a subject men-

tioned in S. 91, but at the same time actually clashed with an existing Dominion legislation. The principles laid down by their Lordships have gone only so far as to permit an incidental encroachment, provided the Dominion field is unoccupied. In no case so far decided have their Lordships tolerated a trespass as well as a clash. If a clash with the Dominion legislation were also allowed, then a Provincial Legislature would be in a position, though indirectly, to nullify the Dominion legislation, even inside the field exclusively open to the Dominion, which would make the position intolerable.

It seems to me that the principles of interpretation laid down by their Lordships in the Canadian cases cannot be brushed aside by simply saying that they relate to a different Constitution. Those principles are not only of the greatest weight but must be a guide to us even in interpreting the Indian Constitution. Of course, we cannot interpret the language of any section in the Indian Act in the light of the interpretation of the corresponding section in the Canadian Constitution. That has to be avoided; but the principles of interpretation that have been established cannot be ignored. At the same time, it would be dangerous to import only a part of the doctrine and exclude another part. Partial application may frustrate the very object for which the rule of law was deduced. The two doctrines of incidental encroachment and unoccupied field are closely related. I would go further and say that they are indissolubly connected. We cannot import the doctrine of incidental encroachment in favour of the provinces, and refuse to import the doctrine of unoccupied field which is in favour of the Centre. The two must go hand in hand. To allow Provincial Legislatures to encroach upon the exclusive Federal field, even though in an indirect way, when there is a Central legislation already occupying the field, would be to give the former a free hand in nullifying Central Acts relating to matters in the Federal List. Such a *carte blanche* could hardly have been contemplated. The scheme of S. 100 of the Act is to exclude completely from the authority of the Provincial Legislature the power to legislate with respect to subjects in List I. If in consequence of certain difficulties that Provincial Legislatures would experience by a rigid enforcement of such an exclusion we must in interpreting the words "with respect to" import the Canadian doctrine of permissibility of incidental

22. (1907) 1907 A C 65 : 76 L J P C 23 : 95 L T 681 : 28 T L R 40, *Grand Trunk Railway of Canada v. Attorney-General of Canada*.

23. (1940) 27 AIR 1940 F C 20 : 187 I O 796 : ILR (1940) Kar F C 88 : 3 F L J F C 46 (F C), *Jai Gobind Singh v. Lachmi Narain Ram*.

encroachment, we must then at the same time import the other allied doctrine also that such an encroachment is permissible only when the field is actually unoccupied. It is only in this way that actual clash between the centre and provinces can be avoided, which I think we must. This will also explain the apparent gap in S. 107 (1) of the Act, that gap being filled in by the provisions of section 100.

The result is that the effect of ss. 8 and 19, Madras Act, is to compel Courts to re-open decrees passed on the basis of promissory notes before the Act came into force, and recalculate the amounts due on them disallowing all interest outstanding on 1st October 1937, and even the principal if double the amount has already been paid by way of interest; while the Negotiable Instruments Act, even read with the Usurious Loans Act, enjoins that interest should be calculated at the contract rate, and no Court should cut down such interest if a decree has already been passed. In my opinion the Provincial Act being repugnant to the existing Indian law relating to promissory notes which is exclusively a Federal subject, is void to that extent.

I, however, agree with the High Court that there is nothing in the Madras Agriculturists Relief Act which really conflicts with any provision of the Hindu law. No doubt, a creditor can always fall back upon the original consideration, and sue upon the debt independently of the promissory note. It is equally true that the sons were impleaded in this case merely to deprive them of the chance of contending that it was not binding upon them on account of its having been tainted with immorality or illegality. A Hindu son is under a pious obligation to pay his father's debts out of the joint family property. But he is not bound to pay what his father cannot be made to pay. If the interest on the loan taken by the father can be cut down under some existing law so as to benefit the father, the son can equally take advantage of that relief.

I also agree that any repugnancy to the Contract Act is cured by the assent of the Governor-General: and further as usurious loans come within money-lending, any conflict with the Usurious Loans Act alone is not material. But for his erroneous conclusion as to the intra vires character of the Madras Act, re-affirmed by the Full Bench decision of the Madras High Court, the subordinate Judge would have had no jurisdiction

to interfere with the decree; and so his order for the satisfaction of the decree, when in fact it had not been satisfied, amounted to acting with an illegality in the exercise of his jurisdiction. The High Court could therefore appropriately exercise its discretion to interfere in revision. I would allow the appeal and remit the case to the High Court with the declaration that the order of the subordinate Judge, dated 11th February 1939 be set aside, and the execution allowed to proceed.

Varadachariar J. — The constitutional question arising for decision in this appeal relates to the validity of Agriculturists' Relief Act, 1938 (4 of 1938), passed by the Madras Legislature. The learned counsel for the appellant, while contesting the validity of the impugned legislation, conceded that it was a genuine and bona fide, though drastic, attempt at a solution of the problem of agricultural indebtedness which has long been recognized as a pressing problem in this country. The Usurious Loans Act passed by the Indian Legislature in 1918 only conferred certain discretionary powers on the Court, and its operation was not limited to agriculturists; it proved ineffective to check the growing burden of rural indebtedness. Recommendations for more drastic measures were made from responsible quarters, but no further action was taken by the Indian Legislature. The inclusion of "money-lending and money-lenders" in List II of Sch. 7 to the Constitution Act justifies the inference that Provincial Legislatures must have been considered better fitted to deal with the subject with adequate knowledge of local conditions and requirements. Both before and after 1935, the local Legislatures in the several provinces have enacted more drastic measures for the purpose. The common feature of these measures was that they compelled the Court to reduce substantially the rate of interest recoverable from a debtor and limited the total amount of interest recoverable on any loan to a sum equal to the principal amount, on the analogy of the damdupat rule. The classes of cases in which relief was available under these enactments varied from province to province. Under the Madras Act in question, relief was afforded to all persons falling within the definition of "agriculturist" given in the Act, and if they were agriculturists, they were entitled to invoke the protection given by the Act, in respect of all liabilities falling within the definition of "debt" given in the Act. It is noteworthy that even decrees passed

before the date of the Act and decrees for money not arising out of loan transactions were directed by the Act to be re-opened, with a view to give the judgment-debtor the benefit of the Act. Certain classes of debts were excluded from the operation of the Act, but no exception was made in respect of debts due under promissory notes or other negotiable instruments.

On the question of the validity and effectiveness of the Act, several possible views have been suggested in the course of the arguments or have emerged therefrom. On the one side, there is the view that the Act is valid in its entirety and is operative in respect of all kinds of debts as defined in the Act. This was the view taken by a Full Bench of the Madras High Court; and the learned Advocate-General of Madras, who intervened in this appeal, naturally supported that view. On the other side, there is the extreme view that the Act is wholly invalid. The learned Advocate-General for India, who appeared for the appellant, put forward this view as a possible contention, but he did not seriously press it. Between these two extremes, two other views were suggested: (1) that the Act was ultra vires or void so far as its provisions were calculated to affect certain classes of debts, particularly those evidenced by promissory notes or other negotiable instruments, or (2) that the Act should as a matter of interpretation, be so construed as not to affect these classes of debts. Dealing with a similar enactment in Bihar, a Division Bench of the Patna High Court recently held that a relieving provision in that Act couched in very wide and general terms could not affect the rights conferred by the Negotiable Instruments Act on the holder of a promissory note or other negotiable instrument, including the right to recover full interest as per terms of ss. 79 and 80 of that Act: see 3 F L J H C 119.⁸ With reference to these intermediate views a further question was raised and discussed before us, namely whether the liability of the respondent in the present case was or was not such as could be validly reduced by an enactment of the Provincial Legislature. In dealing with the questions above stated, the Madras Full Bench and the Advocate-General of Madras (in his arguments before us) relied on certain principles of interpretation laid down by the Judicial Committee in decisions relating to similar questions raised under the British North America Act. In the Patna High Court, more than one learned Judge has strongly protested against

importing these principles — particularly what is described as the "pith and substance" rule—into the construction of the Government of India Act; and in 3 F L J 119³ Meredith J., observed:

There are peculiar provisions in S. 100, Government of India Act, and in my view they bar the application of the pith and substance principle to that Act.

It must always be in the discretion of each Judge to decide for himself how far he can or will accept help and guidance from precedents; but the note of caution sounded by my Lord the Chief Justice in his judgment in 1939 F C R 18¹² at p. 38 as to the application "without qualification" of precedents relating to federal and provincial powers under other systems cannot reasonably be interpreted as altogether banning their use. It seems to me necessary to point out that the assumption in the *Patna case*⁸ that the scheme of S. 100, Constitution Act is radically different from that of ss. 91 and 92, British North America Act, is not warranted. A long line of decisions beginning at least as early as (1881) 7 A C 96³ have interpreted these provisions of the Canadian Constitution in a manner that almost assimilates their scheme to that adopted in S. 100, Government of India Act. There is of course no elaborate Concurrent List in the British North America Act corresponding to List III of Sch. 7 to the Government of India Act and the grant of general legislative power to the Dominion Parliament by the opening words of S. 91 has obviated the necessity for a provision like that made in S. 104, Government of India Act, to meet unforeseen contingencies. But as regards the distribution of powers between the Centre and the provinces, the relations between ss. 91 and 92, British North America Act, is according to the decisions substantially the same as that indicated in S. 100, Constitution Act, between Lists I and II of Sch. 7. The position under the Canadian Constitution was described by Viscount Haldane in 1915 A C 330,²⁴ at p. 337 in the following words:

The general power conferred on the Dominion by S. 91 extends in terms only to matters not coming within the classes of subjects assigned by the Act exclusively to the Legislatures of the Provinces. But if the subject-matter falls within any of the heads of S. 92, it becomes necessary to see whether it also falls within any of the enumerated heads of S. 91, for if so, by the concluding words of that section it is excluded from the powers conferred by S. 92.

24. (14) 1 AIR 1914 P O 174; 1915 A C 330; 84 L J P O 64; 112 L T 183; 31 T L R 35 (P O). *John Deere Plow Co., Ltd. v. Wharton.*

The position of the Provincial Legislatures under the Indian Constitution Act in respect of the subjects enumerated in List II and in relation to the subjects specified in List I is in essence the same as that above stated in regard to the powers of the Provincial Legislature under s. 92, British North America Act. It will be clear from the decisions that the rules of interpretation adopted in the Canadian cases were evolved only as a matter of reasonableness and common sense and out of the necessity of satisfactorily solving conflicts arising from the inevitable overlapping of subjects in any system of distribution of legislative powers. That they need not be limited to any special system of federal constitution is made clear by the fact that in 1937 A C 863¹⁰ at p. 869, Lord Atkin applied the "pith and substance" rule when dealing with a question arising under the Government of Ireland Act—which did not embody a federal system at all—and in 1938 A C 708¹¹ at pp. 719, 720 when dealing with a Canadian case, he embodied in the judgment the principles enumerated in the Irish case.

That the subject-matter of the impugned legislation is to a certain extent at least within the jurisdiction of the Provincial Legislature cannot be and has not been denied. It may be that it will fall partly under one item and partly under another item in List II or List III. For instance, some of the debts affected by the Act may fall under the heading of "trade" and some under the heading of "money-lending" in item 27. Support may in some instances be also derived from item 10 (relating to contracts, etc.) and item 14 (relating to actionable wrongs) in List III. In the Madras Full Bench judgment, the learned Chief Justice expressed the opinion that the Act might also be regarded as one relating to agriculture. This is perhaps open to question, on the ground that "agriculture" in item 20 of List II must be understood as signifying only the process of agriculture (though other allied matters are brought in by a kind of inclusive enumeration) and cannot comprehend a subject like agricultural indebtedness merely because the relief of such indebtedness may contribute to the prosperity and efficiency of agriculture. The decision of the Judicial Committee in 1930 A C 111,⁶ putting a limited interpretation upon the reference to "fisheries" in s. 91, British North America Act, may lend some support to this principle of strict interpretation of the term "agriculture". But it is unnecessary at this stage to consider

whether all conceivable kinds of debts falling within the definition in the Madras Act can or cannot be brought under one or other of the heads in Lists II and III, because that has not been the line of attack adopted by the learned counsel for the appellant. The objection to the impugned Act, in whatever form urged, was based on the fact that List I, of the Sch. 7 to the Constitution Act reserves cheques, bills of exchange, promissory notes and other like instruments for the exclusive competence of the Federal Legislature (item 28). Though the Madras Act does not in terms purport to deal with negotiable instruments, debts due under such instruments will undoubtedly fall within the definition of "debts" in the Act. The question for consideration therefore is whether this inclusion of debts due under negotiable instruments has rendered the Act wholly or in part invalid or inoperative.

The argument of total invalidity need not be dealt with at any length, not only because it was not seriously pressed, but also because there is little force in it. If an enactment deals in part with matters beyond the competence of the Legislature which enacted it, it must be held to be wholly invalid only in cases where the valid and invalid provisions are inseparably intermixed or the innocent provisions are merely ancillary to the offending provisions. This cannot be said to be the position in the present case. Further, as there is no provision in the Act dealing in terms with negotiable instruments, any objection based on the wide scope of the Act may be obviated by so interpreting the general terms used in the Act as to limit them to cases with which alone the Legislature was competent to deal : see (1891) A C 455²⁵ at page 459.

The Full Bench decision of the Madras High Court held that the Act is not invalid or inoperative even in respect of debts due under negotiable instruments, because in the opinion of the learned Judges it did not "really affect the principles embodied in the Negotiable Instruments Act." This statement seems to require qualification. It is of the essence of negotiation (as distinguished from a mere assignment) that a holder in due course must be able to recover the full amount due for principal and interest according to the apparent tenor of the document and he cannot be called upon to

25. (1891) 1891 A C 455 : 60 L J P C 55 : 65 L T 321 : 17 Cox C C 341, *Macleod v. Attorney-General* for New South Wales.

enquire whether the executant of the document or the person liable was an agriculturist or not. If this right is negatived, it cannot be said that the negotiability of the document has not been affected. The question will nevertheless remain, whether, notwithstanding this abridgement of the rights of the holder of a negotiable instrument, the legislation may not be valid and operative in its entirety according to the principles adopted in the decisions of the Judicial Committee in some of the Canadian cases. These cases recognize that even where provincial legislation contains provisions relating to subjects exclusively reserved for the Dominion Legislature, the whole enactment may be effective if the offending provisions are only incidental or if it is possible to regard a subject as falling under the Dominion jurisdiction in one aspect and under provincial jurisdiction in another aspect and the impugned provincial legislation has been enacted in respect of the latter aspect. When it becomes necessary to decide this question, the effect of the decision in (1939) A C 468,²⁶ and its explanation in (1940) A C 513,⁷ will fall to be considered.

On the other hand, a different result might follow if, with reference to the observation of Viscount Haldane in (1921) 2 A C 91² at page 116, it should be held that the items "trade and commerce," "money-lending and money-lenders" in List II and the item "contract" in List III are expressed in "general language" while "cheques, bills of exchange, promissory notes" in item 28 of List I are "particular" items and "general language" in Lists II and III must yield to "particular expressions" in List I, where the latter are unambiguous. In the next succeeding sentence on the same page, their Lordships recognize that this rule may sometimes also apply in favour of the provinces, for otherwise the purpose of assigning the particular item to the province will be frustrated. It does not seem to me necessary for the purpose of this case to decide these questions, because the liability here sought to be reduced with the aid of the provisions of the Madras Act, had long before the date of the enactment of that Act passed into a decretal liability and was no longer one under a promissory note or other negotiable instrument.

For the same reason, it seems to me unnecessary to express a definite opinion on

26. (1939) 1939 A C 468 : 108 L J P O 69 : 83 S J 588:55 T L R 732 : (1939) 3 All E R 98, *Ladore v. Bennett*.

another contention of Sir B. L. Mitter, namely that the provisions of the impugned Act may also be void under S. 107 (1), Constitution Act, in so far as they are repugnant to the provisions of the Negotiable Instruments Act. The validity of this contention will depend upon the import of the expression "federal law" occurring in the opening part of sub-s. (1) of S. 107. It may be conceded that the words "which the Federal Legislature is competent to enact" may refer to the first list also and they need not be qualified by the words occurring later and referring to the Concurrent Legislative List; because, if these later words were intended to qualify the opening words of the sub-section also, it would not have been necessary to use the words "which the Federal Legislature is competent to enact" in the earlier portion. In 3 F L J 119,⁸ Meredith J., seems to take a different view. But as contended by the learned Advocate-General of Madras, the expression "federal law" would prima facie seem, on the wording of S. 316, only to comprehend legislation passed by the Indian Legislature after the Government of India Act of 1935 came into operation and not earlier enactments of the Central Legislature, like the Negotiable Instruments Act. The use of the word "accordingly" in S. 316 suggests that the second part of para. 1 is consequential upon the first and as the first part clearly refers to the transition period—between the introduction of provincial autonomy and the establishment of the Federation,—it would seem to follow that the expression "laws of the Indian Legislature" in the second part refers to the laws passed by the Indian Legislature, while functioning as the "Federal Legislature" during the transition period. This construction would no doubt lead to an apparent anomaly in the operation of S. 107, viz., that while provincial legislation in respect of subjects in the Concurrent List cannot override "existing Indian law" except when assented to by the Governor-General, such legislation in respect of subjects enumerated in List II may without any such safeguard override pre-existing enactments even of the Central Legislature if they relate to subjects specified in List I. It is however conceivable that the position might well have been left like this, because the danger of such interference by the Provincial Legislatures was small. A Provincial Legislature can, if at all, trespass on List I subjects only when it legislates (in fact and not merely colourably) on List II subjects;

whereas in the case of List III subjects, the whole field is open to interference by the Provincial Legislature. But I refrain from expressing any final opinion on this question, as it is unnecessary for the purposes of this case to decide it.

It only remains to consider whether or not the claim of the appellant belonged to a category that could be affected by provincial legislation. The recitals in the promissory note on which the suit was instituted and the admission made in para. 6 of the affidavit filed by the appellant's agent on 3rd October 1938 in the Coimbatore Sub-Court in the present proceedings show that the appellant is a money-lender and the promissory note related to the balance due on account of previous money dealings between the parties. Apart from the existence of the promissory note, the case would clearly fall under the head "money-lending and money-lenders" in item 27 of List II. Under this head, it would probably make no difference in respect of the Provincial Legislature's power to deal with such a case that a decree had been passed in respect of the debt, because, the creditor would not be any the less a "money-lender" on that account. If there should be any doubt on this ground, it might be sufficient to read this head with item 2 in the same list (jurisdiction and powers of Courts). Even if it should be found necessary to call in aid the powers under the Concurrent List, on the ground that there was an interference with the provisions of the Civil Procedure Code relating to decrees, the precaution of obtaining the assent of the Governor-General under section 107 (2), Constitution Act, has been taken in this case. Sir B. L. Mitter was prepared to assume that the passing of the decree would not make any difference; but, on this basis, he contended that where the claim arose out of a promissory note, the matter must be regarded as falling under item 28 of List I (cheques, bills of exchange, promissory notes, etc.), even after a decree had been passed. I am unable to accede to this argument. A distinction may have to be drawn between decrees passed before the date of the Madras Act and decrees passed subsequent to that date.

Assuming, for the sake of argument, that liabilities under negotiable instruments cannot be affected by provincial legislation, it would be anomalous to recognise in the Provincial Legislature a power to reduce the liability under such an instrument as soon

as it merges in a decree. This will be permitting that Legislature to do indirectly what it cannot do directly and inviting every promisor to insist on a suit being filed on his note and then allowing him to avail himself of the benefit of the Act. The Madras Act under consideration does not present any such problem, because S. 19 is limited to decrees passed before the commencement of the Act. Where, as in the present case, that is the position, the provisions affecting the operation or effect of that decree cannot be said to relate to a negotiable instrument. The Act does not attempt to operate on the instrument and the right of the creditor at the moment of the commencement of the Act did not possess the incidents of a negotiable instrument, either as regards negotiability or as to the benefit of S. 79, Negotiable Instruments Act. Relying on the provision in S. 8 to the effect that the liability should be scaled down with reference to the "principal" amount, the learned counsel for the appellant contended that the Act itself treated the promissory note as still the basis of the claim. That does not seem to me to be the correct way of reading a provision which only lays down a method of calculation of the amount to which the decree is to be scaled down. The parties are not relegated to the position of "promisor" and "promisee." Nor does the provision in S. 19 as to the "amending" of the decree imply such restoration of the parties to their status before suit. The decree is reopened, only to the extent necessary to alter the amount payable. This is shown by the fact that in the same paragraph in S. 19, provision has also been made for "entering up satisfaction" if the amount payable as per the terms of the Act has been paid even before the date of the application under S. 19. There is accordingly no reason for holding that the impugned Act is invalid or inoperative so far as the subject-matter of the present proceedings is concerned. This appeal must therefore be dismissed. As the respondent has not appeared, there will be no order as to costs in the appeal.

By the Court. — In accordance with the decision of the majority of the Court, the appeal is dismissed. There will be no order as to costs.

G.N./R.K.

Appeal dismissed.

(28) A. I. R. 1941 Federal Court 69

17th April 1941

GWYER C. J., VARADACHARIAR
AND BEAUMONT JJ.A. L. S. P. P. L. Subrahmanyam
Chettiar — Appellant — Applicant
v.Muttuswami Goundan —
Respondent — Opposite Party.Case No. 2 of 1941, for leave to appeal to His
Majesty in Council, from ('41) 28 A I R 1941 F C 47.

Government of India Act (1935), S. 208 (b) —
Leave to appeal to His Majesty can be granted
only in cases of real importance, cases which
are likely to affect large number of interests in
future or which involve difficult questions of
law — Federal Court holding S. 19, Madras
Agriculturists' Relief Act, to be valid—Decision
dealing with scaling down of decrees obtained
before aforesaid Act came into force—Leave
held should be refused as decision was con-
cerned with section which would not apply in
future, number of decrees passed before Act was
limited and amount in dispute did not exceed
Rs. 4000.

The Federal Court will not be disposed to grant
leave to appeal to His Majesty under S. 208 (b)
save in cases of real importance, cases which are
likely to affect a large number of interests in
future or cases in which difficult questions of law
are involved. [P 69 C 2]

The Federal Court held that S. 19, Madras Agri-
culturists' Relief Act, was validly enacted. The de-
cision of the Court dealt only with the scaling
down of decrees obtained before the Madras Act
came into force :

Held that leave to appeal should be refused on
the ground that the decision of the Federal Court
was concerned with the construction of a section
which would have no application in future, the
number of decrees obtained before the Madras Act
must necessarily be limited and the amount in
dispute did not exceed Rs. 3000 or Rs. 4000 : ('40)
27 A I R 1940 P C 54, Rel. on. [P 69 C 2]

Mohammad Taqi, Senior Advocate, Federal
Court (Raghubir Singh with him) instruct-
ed by B. Banerji, Agent — for Applicant.

Gwyer C. J.—This is an application for
leave to appeal under S. 208 (b), Constitution
Act. The case was one in which the appel-
lant had sued the respondent for a sum due
under a promissory note and had obtained
a decree. After the decree had been ob-
tained, the Madras Agriculturists' Relief Act
became law. That Act gave agriculturist
debtors the right to have their debts drasti-
cally scaled down, and s. 19 empowered the
Courts to apply its provisions to a decree
for the payment of a debt obtained against
an agriculturist before the commencement
of the Act. This Court, when the case came
before it, heard arguments on a variety of
1941 F. C./96

questions, including the question whether
the Act conflicted with the Negotiable In-
struments Act, which is an Act within the
exclusive competence of the Central Legis-
lature; but a majority of the Court were of
opinion that questions relating to the Nego-
tiable Instruments Act were irrelevant for
the purposes of the case, and held that the
original debt had merged in the decree and
that the scaling down was of a liability evi-
denced by a decree and not by a negotiable
instrument at all.

Counsel for the appellant has cited to us
a number of decisions in which the Judicial
Committee itself has indicated the prin-
ciples on which it will act when advising
His Majesty to grant or withhold special
leave to appeal to His Majesty in Council.
This Court will not attempt to formulate in
advance any code of rules which it will take
for its guidance in granting or withholding
leave to appeal to the Judicial Committee,
and will deal with each case on its merits as
it comes before it. But it will not be dis-
posed to grant leave to appeal, save in cases
of real importance, cases which are likely to
affect a large number of interests hereafter
or cases in which difficult questions of law
are involved.

In the present case, the decision of the
Court dealt only with the scaling down of
decrees obtained before the Madras Act
came into force. The number of such decrees
must necessarily be limited, and there can
be no addition to their number. In a case
which was before us in May 1939 and in
which we had refused leave, the applicant
afterwards petitioned the Judicial Commit-
tee for special leave to appeal. The Judicial
Committee, in refusing special leave, em-
phasized the fact that the decision of this
Court was concerned with the construction
of a section which would have no applica-
tion in the future : 67 I A 122.¹ It appears
to the Court that this is a sufficient reason
for refusing leave in the present case. It
should be added that the amount in dispute
in the case appears on the figures which
were given to us not to have exceeded Rs.
3000 or Rs. 4000 at the outside. The major-
ity of the Court declined to enter into any
of the other questions which were raised at
the Bar and reserved their opinion upon all
of them. There is, therefore, nothing to pre-
vent these matters being raised and deter-

1. ('40) 27 A I R 1940 P C 54 : 187 I C 1 : I L R
(1940) Kar P C 132 : 67 I A 122 : I L R (1940)
Lah 448 (P O), Horl Ram Singh v. King-Emperor.

mined at any future time in an appropriate case. The application is dismissed.

G.N./R.K. *Application dismissed.*

(28) A. I. R. 1941 Federal Court 70

17th April 1941

**GWYER C. J., VARADACHARIAR
AND BEAUMONT JJ.**

Mt. Atiga Begum and another —
Applicants
v.

United Provinces — Opposite Party.

Case No. 3 of 1941, for leave to appeal to His Majesty in Council, from ('41) 28 A I R 1941 F C 16.

(a) Government of India Act (1935), Ss. 208 (b), 292 — Leave to appeal to His Majesty can be granted only where matter is of importance and there is substantial question to be determined—Construction of S. 292, Government of India Act by Federal Court held did not involve substantial question on which leave could be granted—Privy Council's decision to be obtained in case not likely to affect future litigation—Case cannot be said to involve question of general public importance and hence leave should be refused.

When dealing with an application for leave to appeal to His Majesty under S. 208 (b) the Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined: (1879) 5 A C 115, *Rel. on.*

[P 71 P 2]

The construction put upon S. 292, Government of India Act, by the Federal Court that S. 292 does not deprive Legislatures in India of the power to legislate with retrospective effect does not admit of such serious doubt as to justify it in holding it to be a substantial question on which leave to appeal to His Majesty should be granted. [P 71 C 1,2]

Where any decision to be obtained from their Lordships of the Privy Council, if an appeal should be permitted to go to them, is not likely to have material bearing upon future litigation the question involved in the case in that sense cannot be said to be of general public importance and therefore leave should be refused. [P 72 C 1]

(b) Government of India Act (1935), S. 208 (b) — High Court declaring U. P. Act 14 of 1938 to be ultra vires—Plaintiff affected by decree not appealing — Appeal by U. P. Government—Plaintiff questioning maintainability of appeal—Federal Court holding appeal to be competent and U. P. Act to be intra vires but not disturbing High Court's decree in plaintiff's favour—Application by plaintiff for leave to appeal to His Majesty — Question of maintainability of appeal held was of importance only to clients in case and as Federal Court did not disturb High Court's decree in petitioner's favour aforesaid question did not justify grant of leave.

The validity of the United Provinces Regularization of Remissions Act, 14 of 1938, was questioned by the applicants before the High Court at Allahabad; and a Full Bench of the High Court

held that the Act was ultra vires the Provincial Legislature on various grounds. The tenant affected by the decree of the High Court did not appeal to the Federal Court, but the Government of the United Provinces, which had taken steps to get itself impleaded as a party just before the case was finally disposed of by the High Court preferred the appeal to the Federal Court. At the hearing of the appeal objection was taken to the maintainability of the appeal. The Federal Court, by a majority, held that the appeal was competent and that the Act was intra vires the Provincial Legislature. The amount of the disputed remission was very small, not even a hundred rupees; and even as to that amount, the Federal Court did not disturb the decree passed by the High Court in the petitioners' favour:

Held: that the procedural question as to the maintainability of the appeal to the Federal Court was a matter of importance only to the clients in the particular case and as the Federal Court did not, even while entertaining the appeal, disturb the decree of the High Court in the petitioner's favour, the procedural question was not one which would justify the grant of leave to appeal.

[P 72 C 1]

Shiva Prasad Sinha, Senior Advocate, Federal Court, (Prem Mohan Lal Verma and Lakshmi Saran with him) instructed by T. K. Prasad, Agent — for Applicants.

Dr. Narain Prasad Asthana, Advocate-General of U. P. and (Sri Narain Sahai with him), instructed by Gurudayal Sahay, Agent — for Opposite Party.

Varadachariar J.—This is an application asking for leave, under S. 208 (b), Constitution Act, to appeal to His Majesty in Council, from a decision of this Court given in December last. The constitutional question raised in the case related to the interpretation of S. 292, Constitution Act. In the special circumstances described in the judgment in that case, the Government of the United Provinces had to direct remission of rent for certain years in the zamindaris in the United Provinces; and when the validity of the remission was successfully questioned in judicial proceedings in the High Court, the U. P. Legislature passed the impugned Act, (No. 14 of 1938) entitled the United Provinces Regularization of Remissions Act, 1938. The validity of this enactment was in turn questioned by the present applicants when the matter was pending before the High Court at Allahabad; and a Full Bench* of the High Court held that this Act was ultra vires the Provincial Legislature on various grounds. One ground on which alone all the three learned Judges who constituted the Full Bench agreed was that S. 292, Constitution Act, precluded Legislatures in India from enacting any law with

* Reported in ('40) 27 A I R 1940 All 272 (FB).

retrospective effect, so as to affect rights accrued before the date of the enactment. The tenant affected by the decree of the High Court did not appeal to this Court, but the Government of the United Provinces, which had taken steps to get itself impleaded as a party just before the case was finally disposed of by the High Court preferred the appeal to this Court.

At the hearing of the appeal objection was taken to the maintainability of the appeal by the United Provinces Government, on the ground that there was no decree against the Government and that the Government was not a proper party to the litigation at all. On the merits, the conclusion of the learned Judges of the High Court that the Act contravened the limitation imposed upon the Legislature by s. 292, Constitution Act, was contested on behalf of the appellant, but it was sought to be supported on various grounds by learned counsel who appeared for the plaintiffs-respondents. This Court, by a majority, held that the appeal was competent; and it unanimously held that the impugned Act was *intra vires* the Provincial Legislature and that s. 292, Constitution Act, did not, on its true construction, deprive Legislatures in India of the power to pass legislation with retrospective effect. It is against this decision that the applicants now seek to appeal to His Majesty in Council.

The amount of the disputed remission is very small, not even a hundred rupees; and even as to that amount, this Court did not (for the reasons given in the judgment) disturb the decree passed by the High Court in the petitioners' favour. The application for leave is supported on three grounds: (1) that the constitutional question involved is of general public importance; (2) that the impugned enactment, namely, Act 14 of 1938 of the United Provinces Legislature, affects the claim of the zamindars of the United Provinces as a body to a large amount of rent remaining in arrears; and (3) that the decision of the majority of this Court on the question of the right of the United Provinces Government to maintain the appeal to this Court is open to criticism. It is true that the learned Judges of the Allahabad High Court interpreted s. 292, Constitution Act, as depriving Legislatures in India of the power to legislate with retrospective effect. But, with all deference to them, this Court is unable to hold that there is room for such serious doubt on the point as to

justify it in holding that that is a substantial question on which leave to appeal to His Majesty in Council is to be granted. When dealing with an application of this kind the Court must be satisfied that the matter is one of importance and that there is really a substantial question to be determined: (1879) 5 A C 115.¹ As observed by the Judicial Committee in that case,

it is not to be presumed that the Legislature of a Dominion has exceeded its powers unless upon grounds really of a serious character.

After giving anxious consideration to the arguments advanced in support of the High Court's view, this Court unanimously came to the conclusion that s. 292, Constitution Act, could not reasonably bear the construction sought to be put upon it by the plaintiffs. It will be observed from the judgment of this Court that many other questions which would have been relevant to the decision of the case had to be left open in the special circumstances in which this Court had to deal with the case. If therefore the matter is to be permitted to go on appeal to His Majesty in Council at all, it will be much more satisfactory that it should go in a case which is properly constituted so as to give their Lordships an opportunity of dealing with all the points arising in a litigation of this kind.

In considering the extent of interest indirectly affected by the United Provinces Act, 14 of 1938, it must be pointed out that the operation of that Act was only temporary, as it sought to regularise certain remissions of rent which according to the opinion of the High Court in another case had been granted in violation of certain provisions of the then existing Rent Act. Those sections in the Rent Act have themselves been repealed by another Act of the United Provinces Legislature passed in the year 1938 and the question is hardly likely to arise in the same form in respect of claims for rent accruing due after 1938. Claims to rent accrued due prior to 1938 can hardly be enforced in any future litigation, as nearly three years have now elapsed. The Court asked for information as to whether any large number of suits relating to rent accrued due prior to 1938 and likely to be affected by Act 14 of 1938 were pending; but no specific information on the point was available. Reference has been made in para. 13 of the petitioners' petition to certain circumstances

1. (1879) 5 A C 115 : 49 L J P O 37 : 41 L T 662, *Valin v. Langlois*.

bearing upon the indirect consequences of the decision of this Court, but even there no information on the above question is available. It cannot, therefore, be said that any decision to be obtained from their Lordships, if this appeal should be permitted to go to them, is likely to have a material bearing upon future litigation and that in that sense the question is of general public importance. The only other point raised is the procedural question as to the maintainability of the appeal to this Court by the United Provinces Government. That is a matter of importance only to the clients in the particular case and as this Court did not, even while entertaining the appeal, disturb the decree of the High Court in the plaintiffs' favour, it is not possible to accept the contention that this procedural question is one which will justify the grant of leave to appeal. The application is accordingly dismissed. There will be no order as to costs.

G.N./R.K. *Application dismissed.*

*** * (28) A. I. R. 1941 Federal Court 72**

22nd April 1941

**GWYER C. J., VARADACHARIAR AND
BEAUMONT JJ.**

*In the matter of the Hindu Women's
Rights to Property Act, 1937.*

Case No. 1 of 1941, a Special Reference by His Excellency the Governor-General.

* * (a) Hindu Women's Rights to Property Act (1937), S. 3 — Act cannot be questioned by reason of S. 317, Constitution Act, on ground that it was introduced into Legislature and passed by Legislative Assembly before Part 3, Constitution Act, came into force — Fact that powers of Legislature changed during passage of Bill from Legislative Assembly to Council of State is immaterial — Only date material for considering validity of Act is 14th April 1937 when Governor-General's assent was given.

By reason of S. 317 of the Constitution Act, no objection can be taken to the validity of the Hindu Women's Rights to Property Act, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part 3, Constitution Act, came into force. The fact that the powers of the Legislature changed during the passage of the Bill from the Legislative Assembly to the Council of State is immaterial. The form, content or subject-matter of a Bill at the time of its introduction into, or of its consideration by either Chamber of the Legislature is not a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter with which a Court can interfere, or indeed on which it

is entitled to express any opinion. Consequently the question whether the Hindu Women's Rights to Property Act was or was not within the competence of the Legislature must be determined only with reference to the date on which it was assented to by the Governor-General, i. e., 14th April 1937. [P 74 C 2; P 75 C 1]

* * (b) Hindu Women's Rights to Property Act (1937), S. 3 — Principles of construction stated — Word "property" as used in Act does not include agricultural land — Act is not ultra vires.

There is a general presumption that a Legislature does not intend to exceed its jurisdiction. When a Legislature with limited and restricted powers makes use of a word of such wide and general import as "property," the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other and unless the Act is to be regarded as wholly meaningless and ineffective, the word "property" as used in the Act must be construed as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On the true construction of the Act and especially of the word "property" as used in it, no part of the Act is beyond the Legislature's powers: (1890) 25 Q B D 129; (1882) 8 A C 82; (1891) A C 455; (1897) 1 Q B 396 and (1904) 1 C L R 91, *Rel. on.* [P 75 C 2]

The Hindu Women's Rights to Property Act is a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation, and even though it be found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature; and for this reason also the word "property" as used in the Act must be interpreted as referring to property other than agricultural land: (1875) 1 Ch D 182, *Rel. on.* [P 77 C 1]

(c) Interpretation of statutes — General words in statute — Narrow construction to bring words within Legislature's competence leaving Act with nothing in it or Act different in kind and not merely in degree — Whole Act must be held invalid — Narrow construction leaving Act complete, valid and executable by itself — Act must be upheld.

If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature intended the general words which it has used to be construed only in the narrower sense: (1910) 11 O L R 689; (1934) 51 O L R 677; (1910) 11 O L R 1 and (1925) 35 O L R 422, *Rel. on.* [P 77 C 1, 2]

If the Act is to be upheld, it must remain even when a narrower meaning is given to the general words "an Act which is complete, intelligible and

valid and which can be executed by itself" : (1886) 116 U S 252, *Rel. on.* [P 77 C 2]

* * (d) Hindu Women's Rights to Property Act (1937, as amended by Act 11 of 1938), S. 3—Act does not regulate succession to agricultural land in Governors' Provinces — It regulates devolution by survivorship of property other than agricultural land — Subject of devolution by survivorship of aforesaid property is included in entry 7, List 3 of Government of India Act.

The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, do not operate to regulate succession to agricultural land in the Governors' Provinces and do operate to regulate devolution by survivorship of property other than agricultural land : ('21) 8 A I R 1921 P C 62; 13 Cal 21 (P C) ; ('35) 22 A I R 1935 Cal 212 and ('21) 8 A I R 1921 Mad 168 (F B), *Ref.* [P 79 C 2]

The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7, List 3, the Concurrent list of the Government of India Act. [P 79 C 2]

Sir Brojendra Mitter, Advocate-General of India, (Asadullah Khan with him), instructed by K. Y. Bhandarkar, Agent —
for Government of India.

Sir Alladi Krishnaswami Aiyer, (Advocate-General of Madras, (N. Rajagopala Iyengar with him), instructed by Ganpat Rai, Agent and Dr. Narain Prasad Asthana, Advocate-General of U. P. (Sri Narain Sahai with him), instructed by Gurudayal Sahay, Agent —
— Amicus Curiae.

Gwyer C. J.—This is a special reference which His Excellency the Governor-General has been pleased to make to the Court under s. 218, Constitution Act. The questions referred are :

(1) Does either the Hindu Women's Rights to Property Act, 1937 (Central Act, 18 of 1937), which was passed by the Legislative Assembly on 4th February 1937, and by the Council of State on 6th April 1937, and which received the Governor-General's assent on 14th April 1937, or the Hindu Women's Rights to Property (Amendment) Act, 1938 (Central Act, 11 of 1938), which was passed in all its stages after 1st April 1937, operate to regulate (a) succession to agricultural land? (b) devolution by survivorship of property other than agricultural land?

(2) Is the subject of devolution by survivorship of property other than agricultural land included in any of the entries in the three Legislative Lists in Sch. 7, Government of India Act, 1935?

There being no "opposite party" properly so called to this reference, it was not considered necessary or useful to serve any parties with notice of the reference. But as the Court desired to hear the various possible viewpoints presented and argued, it suggested to the Advocate-General of India the desirability of inviting brief statements from the Advocates-General of the Provinces, containing the point of view that

each of them wished to present and arguments in support thereof. The Advocate-General of India has filed a statement on behalf of the Government of India and he has also placed on the file statements from the Advocates-General of seven of the Provinces. As the Court further intimated that besides hearing the Advocate-General of India it would be prepared to hear two more counsel, the Advocates-General of Madras and the United Provinces appeared and took part in the argument. The Court is indebted to all the learned counsel for the assistance which they have afforded it.

The doubts which have led to the reference arise from the fact that the bill which became the Hindu Women's Rights to Property Act, 1937 (Act 18 of 1937), which for convenience is hereafter referred to as Act 18, was passed by the Legislative Assembly of the Indian Legislature on 4th February 1937, that is, before Part III, Constitution Act, came into operation and at a time when the powers of the Legislature were plenary, but was passed by the Council of State only on 6th April 1937, that is, after Part III had come into operation, and received the Governor-General's assent only on 14th April 1937. After 1st April 1937, the Central Legislature was precluded from dealing with the subjects enumerated in List II of Sch. 7, Constitution Act, so far as the Governors' Provinces were concerned. Laws with respect to the "devolution of agricultural land" could be enacted only by the Provincial Legislatures (entry No. 21 of List II), and "wills, intestacy and succession, save as regards agricultural land" appeared as entry No. 7 of List III, the Concurrent List. Act 18, read with the amending Act of 1938, endeavoured to improve the position of Hindu widows in two classes of cases (a) where by the operation of the principle of survivorship the widow is excluded from enjoyment of the share of her husband in property which he held jointly with other coparceners; and (b) where, even apart from the rule of survivorship, the widow is excluded from claiming any share in her husband's estate by reason of the existence of sons, grandsons or great-grandsons of the deceased who under the law take in preference to the widow. Provision is also made for securing a share to a widow even in cases where her husband had pre-deceased the last male owner (S. 3 (1), first proviso). The Act purports to deal in quite general terms with the "property" or "separate property" of a Hindu dying intestate, or his "interest in

joint family property"; it does not distinguish between agricultural land and other property and is therefore not limited in terms to the latter. It may be mentioned that some aspects of the questions now referred have already been discussed in one or two cases (see, for instance, I L R (1939) ALL 912¹) on the assumption that the bill had been passed even by the Council of State before the new Constitution came into force. From the dates given in the present reference it will be seen that this assumption is not correct. It may be added that the validity and operation of the amending Act of 1938 (Act 11 of 1938) call for no separate discussion, since it does not enact any independent provisions, but merely makes some amendments in the Act of the previous year.

Of the questions referred, question (2) will in effect be answered by the views to be expressed in the course of the discussion of question (1); and it is therefore not separately considered. In the statements filed before the hearing and in the course of the arguments, the following contentions were raised with respect to question (1): (i) That Act No. 18 was never properly passed at all, in view of the stage at which it was taken up and dealt with by the Council of State and the Governor-General. (ii) That the Act was in any view ultra vires the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces. (iii) That if the Act should be held to be only in part ultra vires, it would not on the authorities be permissible to sever the good from the bad, so as to allow it at any rate to operate in respect of property other than agricultural land in the Governors' Provinces. (iv) That even if it were permissible to uphold the Act to a limited extent, the provision in S. 3 (2) relating to the interest of the deceased in Hindu joint family property would be ultra vires the Indian Legislature, on the ground that the mention of "succession" in entry No. 7 of List 3 of Sch. 7 does not include or authorize legislation in respect of the benefit which accrues to the members of a Mitakshara joint Hindu family under the rule of survivorship.

In addition to the constitutional points above summarized, a suggestion was made on the construction of the Act that it does not provide for the devolution of any property by survivorship nor confers on the

widow a right by survivorship, though it gives her the same interest in the joint property as her deceased husband had. This does not seem to be tenable. It is true that S. 3 of the Act does not use the word "survivorship", and it may be that the widow taking a share under the Act does not become a coparcener with the other sharers; but there can be no doubt that in the cases in which it gives to the widow of a deceased coparcener a right to a share in the joint property which she did not possess under the pre-existing law, it takes away to that extent the benefit of the rule of survivorship which would have accrued to the remaining coparceners. The reference must, therefore, be dealt with on the footing that so far as its effect goes, the Act does legislate "with respect to" the law of survivorship. It can make no difference for this purpose whether the measure confers on one person a benefit by way of survivorship or takes away from another the benefit of survivorship. On the first contention, the Court is satisfied that no objection can be taken to the validity of the Act, on the ground only that it was introduced into the Legislature and passed by the Legislative Assembly before Part 3, Constitution Act, came into force. Part 13, Constitution Act, contains certain provisions entitled "Transitional Provisions", which are to apply "with respect to the period elapsing the establishment of the Federation". It is then enacted by S. 317 that the provisions of the Government of India Act, 1919, set out (with certain amendments consequential on the provisions of the Constitution Act) in Sch. 9, are to continue to have effect, that is, during the transitional period, notwithstanding the repeal of the earlier Act by the Constitution Act. Among the provisions thus continued are the provisions of the earlier Act relating to the Indian Legislature; and it is clear that the Indian Legislature which was in existence immediately before the coming into force of Part 3 of the Act was continued in existence after that date, and was in all respects the same Legislature, though its legislative powers were no longer as extensive as they had previously been.

One of the provisions included in Sch. 9 is that a bill shall not be deemed to have been passed by the Indian Legislature unless it has been agreed to by both Chambers either without amendment or with such amendments only as may be agreed to by both Chambers. It is common ground that the Hindu Women's Rights to Property Bill

1. ('39) 26 A I R 1939 All 706 : 185 I C 420 : ILR (1939) All 912 : 1939 A L J 875, Janak Dulari v. Sri Gopal.

was agreed to without amendment by both Chambers of the Indian Legislature, and as soon as it received the Governor-General's assent, it became an Act (Sch. 9, para. 68 (2)). Not until then had this or any other Court jurisdiction to determine whether it was a valid piece of legislation or not. It may sometimes become necessary for a Court to inquire into the proceedings of a Legislature, for the purpose of determining whether an Act was or was not validly passed; for example, whether it was in fact passed, as in the case of the Indian Legislature the law requires, by both Chambers of the Legislature before it received the Governor-General's assent. But it does not appear to the Court that the form, content or subject-matter of a bill at the time of its introduction into, or of its consideration by either Chamber of the Legislature is a matter with which a Court of law is concerned. The question whether either Chamber has the right to discuss a bill laid before it is a domestic matter regulated by the rules of the Chamber, as interpreted by its speaker, and is not a matter with which a Court can interfere, or indeed on which it is entitled to express any opinion. It is not to be supposed that a legislative body will waste its time by discussing a bill which, even if it receives the Governor-General's assent, would obviously be beyond the competence of the Legislature to enact; but if it chooses to do so, that is its own affair, and the only function of a Court is to pronounce upon the bill after it has become an Act. In the opinion of this Court, therefore, it is immaterial that the powers of the Legislature changed during the passage of the bill from the Legislative Assembly to the Council of State. The only date with which the Court is concerned is 14th April 1937, the date on which the Governor-General's assent was given; and the question whether the Act was or was not within the competence of the Legislature must be determined with reference to that date and to none other.

It is convenient to consider the second and third contentions together, viz. that the Act was beyond the competence of the Indian Legislature, so far as its operation might affect agricultural land in the Governors' Provinces; and that, if it were held to be in part beyond the competence of the Legislature, its provisions were not severable, so that it could not even affect property other than agricultural land. No doubt if the Act does affect agricultural land in the Governors' Provinces, it was beyond the com-

petence of the Legislature to enact it; and whether or not it does so must depend upon the meaning which is to be given to the word "property" in the Act. If that word necessarily and inevitably comprises all forms of property, including agricultural land, then clearly the Act went beyond the powers of the Legislature; but when a Legislature with limited and restricted powers makes use of a word of such wide and general import, the presumption must surely be that it is using it with reference to that kind of property with respect to which it is competent to legislate and to no other. The question is thus one of construction, and unless the Act is to be regarded as wholly meaningless and ineffective, the Court is bound to construe the word "property" as referring only to those forms of property with respect to which the Legislature which enacted the Act was competent to legislate; that is to say, property other than agricultural land. On this view of the matter, the so-called question of severability, on which a number of Dominion decisions, as well as decisions of the Judicial Committee, were cited in the course of the argument does not arise. The Court does not seek to divide the Act into two parts, viz., the part which the Legislature was competent, and the part which it was incompetent, to enact. It holds that, on the true construction of the Act and especially of the word "property" as used in it, no part of the Act was beyond the Legislature's powers. There is a general presumption that a Legislature does not intend to exceed its jurisdiction: Maxwell on the Interpretation of Statutes (Edn. 8) p. 126; and there is ample authority for the proposition that general words in a statute are to be construed with reference to the powers of the Legislature which enacts it. "It seems to me" said Lord Esher M. R. in (1890) 25 Q B D 129³ at p. 134,

that, unless Parliament expressly declares otherwise, in which case, even if it should go beyond its own rights as regards the comity of nations, the Courts of this country must obey the enactment, the proper construction to be put on general words used in an English Act of Parliament is, that Parliament was dealing only with such persons or things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise), when it uses general words, is only dealing with persons or things over which it has properly jurisdiction.

Where the expression "personal estate" occurred in a Victorian statute imposing

2. (1890) 25 Q B D 129 : 59 L J Q B 465 : 62 L T 853 : 38 W R 545, Colquhoun v. Heddon.

duties on the estates of deceased persons, it was held by the Judicial Committee that it must be construed as referring only to such personal estate as the colonial grant of probate conferred jurisdiction on the personal representatives to administer, whatever the domicile of the testator might be, that is to say, personal estate situate within the Colony, in respect of which alone the Supreme Court of Victoria had power to grant probate :

Their Lordships think that in imposing a duty of this nature the Victorian Legislature also was contemplating the property which was under its own hand, and did not intend to levy a tax in respect of property beyond its jurisdiction. And they hold that the general expressions which import the contrary ought to receive the qualification for which the appellant contends, and that the statement of personal property to be made by the executor under S. 7 (2) of the Act should be confined to that property which the probate enables him to administer: [(1882) 8 A C 82³ at p. 98].

In the well known case in (1891) A C 455,⁴ the Legislature of New South Wales had enacted a law providing that

whosoever being married marries another person during the life of the former husband or wife, whosoever such second marriage takes place, shall be liable to penal servitude for seven years.

The appellant, who had during the lifetime of his wife married another woman in the United States of America and had in a New South Wales Court been convicted of bigamy under the provisions of this law, contended that the Court had had no jurisdiction to try him for the alleged offence, since the Act under which he was tried, according to its true construction, was limited to offences committed within the jurisdiction of the local Legislature by persons subject at the time of the offence to its jurisdiction; and that upon any other construction the Act would be ultra vires. Lord Halsbury, delivering the judgment of the Judicial Committee, observed that if their Lordships construed the statute as it stood and upon the bare words, any person, married to any other person, who married a second time anywhere in the habitable globe, was amenable to the criminal jurisdiction of New South Wales, if he could be caught in that Colony. 'That seems to their Lordships,' he continued,

to be an impossible construction of the statutes; the Colony can have no such jurisdiction, and their Lordships do not desire to attribute to the Colonial Legislature an effort to enlarge their jurisdiction to such an extent as would be in-

3. (1882) 8 A C 82 : 52 L J P C 10 : 48 L T 441 : 31 W R 645, *Blackwood v. Reg.*

4. (1891) 1891 A C 455 : 60 L J P C 55 : 65 L T 321 : 17 Cox C O 341, *Macleod v. Attorney-General for New South Wales.*

consistent with the powers committed to a Colony, and indeed inconsistent with the most familiar principles of international law. It therefore becomes necessary to search for limitations, to see what would be the reasonable limitation to apply to words so general; and their Lordships take it that the words whosoever being married mean whosoever being married, and who is amenable, at the time of the offence committed, to the jurisdiction of the Colony of New South Wales.

And again in a later passage :

It appears to their Lordships that the effect of giving the wider interpretation to this statute necessary to sustain this indictment would be to comprehend a great deal more than Her Majesty's subjects; more than any persons who may be within the jurisdiction of the Colony by any means whatsoever; and that therefore, if that construction were given to the statute, it would follow as a necessary result that the statute was ultra vires of the Colonial Legislature to pass. Their Lordships are far from suggesting that the Legislature of the Colony did mean to give to themselves so wide a jurisdiction. The more reasonable theory to adopt is that the language was used, subject to the well-known and well-considered limitation, that they were only legislating for those who were actually within their jurisdiction, and within the limits of the Colony.

The principle is the same for all law-making bodies with limited powers :

Now it is true that a by-law must be, as a general rule, consistent with the principles of the common law; that if it violates those principles it is bad; and it follows that if it is capable of two constructions, one of which would make it bad and the other good, we must adopt that construction which will make it consonant with the principles of the common law : [(1897) 1 Q B 396,⁵ at p. 399].

In (1904) 1 C L R 91,⁶ the High Court of Australia held that they would not be justified in assuming that a State Parliament intended general words in an enactment to have an application which would conflict with the constitution of the Commonwealth.

It is in our opinion a sound principle of construction that Acts of a sovereign legislature, and indeed of subordinate Legislatures such as a municipal authority, should, if possible, receive such an interpretation as will make them operative and not inoperative. . . . It is a settled rule in the interpretation of statutes that general words will be taken to have been used in the wider or more restricted sense according to the general scope and object of the enactment (at pp. 119, 120).

There is this also to be said. The underlying purpose of Act 18 is plainly stated in its Preamble: "Whereas it is expedient to amend the Hindu law to give better rights to women in respect of property." It is therefore a remedial Act seeking to remove or to mitigate what the Legislature presumably regarded as a mischief; and as such it ought to receive a beneficial interpretation :

5. (1897) 1 Q B 396 : 66 L J Q B 170 : 75 L T 590 : 18 Cox C C 481 : 61 J P 102, *Collman v. Mills.*

6. (1904) 1 C L R 91, *D'Emden v. Pedder.*

If the enactment be manifestly intended to be remedial, it must be so construed as to give the most complete remedy which the phraseology will permit: [Gover's Case, (1875) 1 Ch D 182⁷ at page 198].

It may well be that the Indian Legislature, if it had been able to pass the Act while it still possessed plenary powers, would have desired that the "better rights" which it sought to give to Hindu women should extend to agricultural land as well as to other property; but it cannot be supposed that when, after restriction of its powers, it passed an Act with the above Preamble, it did not intend to make the enactment as effective as it was within its power to make it. It was contended before the Court that the passing of the Act with a restricted effect might result in some cases in a widow being deprived of advantages which she possessed under the pre-existing law. The examples adduced by the Advocate-General of India were by no means conclusive, and it should not be assumed that the Court accepts the contention; but even if it were true that an Act intended to be remedial, though possibly limited in scope, was found in a small minority of cases to prejudice rather than to benefit those whom it was intended to help, this would be no reason why the Court should not adopt the construction which is on the whole best calculated to give effect to the manifest intention of the Legislature.

The Court has already pointed out that the question is one of the construction of the Act, that is to say, of ascertaining its true meaning, and that the construction which has commended itself to the Court leaves no room for the application of the principle of non-severability of subject-matter. It should not however be thought that the Court has overlooked cases cited to it in which the same words have been applied in an Act to a number of purposes, some within and some without the power of the Legislature, and the whole Act has been held to be bad. If the restriction of the general words to purposes within the power of the Legislature would be to leave an Act with nothing or next to nothing in it, or an Act different in kind, and not merely in degree, from an Act in which the general words were given the wider meaning, then it is plain that the Act as a whole must be held invalid, because in such circumstances it is impossible to assert with any confidence that the Legislature in-

tended the general words which it has used to be construed only in the narrower sense: (1910) 11 C L R 689,⁸ (1934) 51 C L R 677,⁹ (1910) 11 C L R 1¹⁰ and (1925) 35 C L R 422.¹¹ If the Act is to be upheld, it must remain, even when a narrower meaning is given to the general words, "an Act which is complete, intelligible and valid and which can be executed by itself;" Wynes: Legislative and Executive Powers in Australia 51, citing (1886) 116 U S 252.¹² These words appear to the Court apt to describe Act 18, if construed as the Court has thought right to construe it, that is to say, even when a narrower meaning is given to the general words which the Legislature has used.

It remains to deal with the fourth contention, that is, with regard to the import of the term "succession" in entry No. 7 of List III and of the word "devolution" in entry No. 21 of List II. The question raised is whether these words which *prima facie* imply the passing of an interest from one person to another can include the change which takes place under the Mitakshara law in the extent of the interest possessed by the male members of a joint Hindu family in the joint property when one of these members dies. Borrowing a term from the English law, this change has been described as the operation of the principle of survivorship. But the note of caution sounded by Lord Dunedin in 43 ALL 228¹³ as to the use of the terms "coparcenary" and "coparceners" in relation to a Mitakshara joint family is equally applicable to the use of the terms "joint tenancy" and "survivorship;" for the incidents associated with joint ownership under the Mitakshara law are not identical with those known to the English law of joint tenancy. There is however this degree of resemblance between the *jus accrescendi* and the effect of the death of one of the owners of joint family property under the Mitakshara law, that in a sense there is only an extinction of the deceased person's interest, and the shares of the survivors, whose pre-existing interest extended over

8. (1910) 11 C L R 689, Owners of SS. Kalibia v. Wilson.

9. (1934) 51 C L R 677, Vacuum Oil Company Ltd. v. State of Queensland.

10. (1910) 11 C L R 1, R. v. Commonwealth Court of Conciliation and Arbitration.

11. (1925) 35 C L R 422, British Imperial Oil Co. Ltd. v. Federal Commissioner of Taxation.

12. (1886) 116 U S 252, Presser v. Illinois.

13. (21) 8 A I R 1921 P O 62 : 60 I O 534: 43 All 228 : 48 I A 195 (P O), Baljnath Prasad Singh v. Tej Ball Singh.

7. (1875) 1 Ch D 182 : 45 L J Ch 88 : 38 L T 619; 24 WR 125, Coal Economising Gas. Co., In re.

the whole property, are increased only because of the diminution in the number of sharers. The argument therefore is that words like "devolution" and "succession" cannot be held to include cases where the deceased person's interest does not pass to another but is merely extinguished or lapses. There are at least two answers to this argument.

Whatever may be the position under the English law, the theory of extinction does not exactly describe the position which arises on the death of a member of a Mitakshara joint family. The result of a long course of decisions is that certain legal acts continue to operate on the interest of the deceased member even when what is ordinarily spoken of as the rule of survivorship is taking effect. Thus, if a creditor obtains a decree against a member of a joint family and during the latter's life-time attaches his undivided interest in the family property, the creditor will be entitled to proceed against that interest to the extent necessary for the satisfaction of his claim even after the property has survived to the other members by reason of the death of the judgment-debtor. In some of the Provinces, there have also been decisions recognizing a right of voluntary alienation in each joint owner, in respect of his undivided share, when the alienation is for value; and, if in this part of the country a member creates a mortgage over his undivided share, such mortgage has been held to be operative even after the death of the mortgagor. According to several decisions of the Madras High Court, the alienation by a member of his undivided share does not disrupt the joint status and yet the rights of the purchaser have been held not to be defeated by the death of the alienor, though no suit for partition be instituted during his life-time. Results of this kind are wholly inconsistent with the theory of extinction or lapse, and even more so when the deceased happens to be the father of the survivors. It was recognized as early as 13 Cal 21¹⁴ that the application of the theory of the son's "pious obligation" to pay the father's debts has practically resulted in the pro tanto extinction of the son's independent rights in the family property; and S. 53, Civil P. C., provided that to the extent to which joint family property remained liable for the father's personal debts even after his death, it "shall be deemed to be property which

has come to the hands of the son as his legal representative."

It is equally important to remember that neither in their ordinary grammatical significance nor by a long continued use in a technical sense have the words "devolution" and "succession" acquired a connotation that would preclude their application to describe the operation of the rule of survivorship as above explained. Eminent text-writers and Judges have used one or the other of these terms to include the accession of right which takes place on the death of one of the members of a Mitakshara joint family. Many enactments of Parliament and of the Indian Legislature have used the words "inheritance" and "succession" in juxtaposition, justifying the inference that succession is either another category from or a wider category than "inheritance" (see some of these enactments referred to in Ilbert's Government of India, Chap. 4, and in Mulla's Hindu Law, page 4). If in these enactments "succession" should be held not to include the principle of survivorship, it would be difficult to say what else that word is meant to refer to and in any other view the continued administration of that part of the Hindu law by the British Indian Courts could not have been provided for, because there are no other appropriate words in those provisions. Such being the position as to the meaning of the words, it is permissible to add that it is difficult to conceive of any reason why in framing Lists 2 and 3 Parliament should have thought fit to take away the law of survivorship from the jurisdiction of the Indian Legislatures, and there is no justification for attributing oversight either, when, as above explained, the language employed may properly be held to comprehend the law of survivorship as well.

A line of cases in the High Courts dispensing with the production of a succession certificate when title to a "debt" is claimed by survivorship may seem to support the restricted interpretation of the word "succession:" *c f.* 62 Cal 15¹⁵ at p. 16. But taking this class of decisions as a whole they must be understood to rest not so much on the connotation of the word "succession" as on the meaning of the expression "effects of the deceased person" and on the reason of the rule relating to the production of a succession certificate in support of the claim to a "debt" *prima facie* due to a deceased per-

14. ('86) 13 Cal 21 : 13 I A 1 : 4 Sar 682 (P O), Nanomi Babuasin v. Modhun Mohun.

15. ('35) 22 A I R 1935 Cal 212 : 155 I C 158 : 62 Cal 15 : 60 C L J 158 : 38 C W N 1132, Shailabala Dasse v. Gobardhandas.

son: see 44 Mad 499.¹⁶ In any event, the two enactments not being in pari materia, such observations as may be found in these cases in support of the limited interpretation of the word "succession" cannot be held to be sufficient to override the cumulative effect of the considerations referred to above. In one or two instances, eminent writers have employed language suggesting that "devolution" may comprehend cases of survivorship but not the word "succession" (see Mayne's Hindu Law, para. 270), but it is difficult to find any basis for this distinction. "Devolution" may be wider in scope than "succession" in the sense that the former is not restricted to the result of a "death" (see O. 22, R. 10, Civil P. C.), but that is immaterial for the present purpose; and, as

16. ('21) 8 A I R 1921 Mad 168 : 62 I C 944 : 44 Mad 499 : 40 M L J 481 (F B), Viranan Chettiar v. Srinivasa Chariar

already stated, eminent Judges have used both the terms in a sense that will include the operation of the principle of survivorship.

The Court is therefore of opinion that the answers to the questions comprised in the special reference are as follows : (1) The Hindu Women's Rights to Property Act, 1937, and the Hindu Women's Rights to Property (Amendment) Act, 1938, (a) do not operate to regulate succession to agricultural land in the Governors' Provinces; and (b) do operate to regulate devolution by survivorship of property other than agricultural land. (2) The subject of devolution by survivorship of property other than agricultural land is included in entry No. 7 of List 3, the Concurrent List. The Court will report to His Excellency accordingly.

G.N./R.K.

Answer accordingly.

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